United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

77-7138

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P/S

United States Court of Appeals

For the Second Circuit.

FRUEHAUF CORPORATION,
Plaintiff-Appellant,

against

SEATRAIN LINES INC. and
STRICK CORPORATION,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES COURT OF APPEALS
FILED
MAY 2 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

APPENDIX.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1977

(1458)

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

- -X

FRUEHAUF CORPORATION,

Plaintiff-Appellant,

-against-

SEATRAIN LINES INC., and
STRICK CORPORATION,

Defendants-Appellees.

- -X

DOCKET ENTRIES.

Date	Proceedings
1973	
Jan. 8	Filed Complaint issued summons.
Feb. 1	Filed Summons and marshals ret. Served: Strick Corp., on 1/22/73 Seatrain Lines Inc. on 1/15/73
Feb. 14	Filed Stip & Order that the time for dfts. Seatrain Lines Inc. & Strick Corp to answer to complaint is extended to 3/7/73. So Ordered Carter J.
Feb. 23	Filed Interrogs propounded by pltff. to dft. Strick Corp., etc.
Feb. 23	Filed Interrogs propounded by pltff to dft. Seatrain Lines Inc., etc.
Mar. 8	Filed Stip & Order that the time for dfts. Seatrain Lines, Inc. & Strick Corp., to answer to Interrogs. is extended to 4/9/73. So Ordered Carter
Mar. 8	Filed Stip & Order that the time for dfts. Seatrain Lines Inc. & Strick Corp., to answer to Complaint is extended to 4/2/73. So Ordered Carter

DOCKET ENTRIES

Date	Proceedings
Apr. 12	Filed Defts Answers of SeaTrain Lines, Inc. to Interrogs propounded by Pltff.
Apr. 12	Filed ANSWERS to CROSS-CLAIM of Defts Robert Martin Corp, Robert Weinberg & Martin Berger. T & B
Apr. 3	Filed Defts' ANSWER to COMPLAINT & Demand Trial by Jury.
Apr. 3	Filed Defts' Notice to Produce Documents.
1974	
Jun. 17	Filed defendant's trial memorandum
Aug. 5	Filed consent pre trial order - Carter, J.
1975	
Jul. 16	Filed defts affdvt. and ORDER TO SHOW CAUSE why an order should not be entered vacating pltf's notice to take depositions. Personal service by 7-16-75 at 5 PM. -- ret. 7-24-75 at 10 AM --- Carter, J.
Jul. 22	Filed pltf's affdvt. in opposition to defts motion.
Jul. 11	Filed pltf's notice to take depositions of Lou Schnauber on 7-25-75
Jul. 24	Filed memo endorsed on defts. O.S.C. filed on 7-16-75. Disposed of as announced to parties this day. So ordered. -- Carter, J. m/n
Oct. 6	Filed stip. and order that the time of the parties to conduct discovery on the issue of damages is ext. to 11-3-75 and that the parties shall have until 11-7-75 to amend pre-trial order -- Carter, J.
Nov. 6	Filed stip. and order ext. time for parties to conduct discovery on the issue of damages to 12-5-75 and the parties have until 12-12-75 to amend pre-trial order - Carter, J.

DOCKET ENTRIES

Date	Proceedings
Nov. 26	Filed Deft's notice of taking Deposition of Pltff on 12-04-75.
Dec. 15	Filed Stip & Order of amendments to Pre-Trial order.
1976	
Dec. 8	Before Lumbard, C.J. -- Non-Jury Trial Begun
Dec. 9	Trial Continued
Dec. 13	Trial Continued and Concluded --- Decision Reserved.
Dec. 28	Filed Transcript of Record of Proceedings dated 12/8, 9, 13, 1976.
1977	
Jan. 4	Filed Pltff's. Proposed Findings of Fact and Memorandum of Law.
Jan. 24	Filed Defts'. Proposed Findings of Fact and Conclusions of Law.
Feb. 1	Filed Pltff's. Reply Memorandum.
Feb. 24	Filed Opinion #45,630 constituting the court's findings of fact and conclusions of law. F.R. Civ. P. 52. Complaint Dismissed. -- Lumbard, C.J. Mailed Notices.
Feb. 28	Filed Judgment that Defts., Seatrain Lines, Inc., and Strick Corporation have judgment against Pltff., Fruehauf Corporation dismissing the complaint. -- Clerk-- Mailed Notices -- ent. 2/28/77.
Mar. 23	Filed Pltff's. Notice of Appeal to the USCA from the judgment entered on 2/28/77. (Mailed copy to Simpson, Thacher & Bartlett.)

DOCKET ENTRIES

Mar. 25	Filed Bill of Costs as taxed in the sum of $358.50. in favor of both defts., as against Pltff., and added to the judgment and docketed as Judgt. #77,430.
Mar. 31	Filed affdvt. and notice of motion on behalf of Defts. for a review of taxation of certain costs made by Clerk on 3/25/77.--Ret. 4/13/77 at 9:30 A.M.
Mar. 31	Filed Memorandum of Law in support of Defts'. motion to review taxation of costs.
Apr. 6	Filed stipulation & order that no issue exists with respect to choice of law. Lombard, C.J.

COMPLAINT.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

FRUEHAUF CORPORATION,

Plaintiff,

-against-

SEATRAIN LINES, INC. and
STRICK CORPORATION,

Defendants.

----------X

Civil Action File
No. 73 Civ. 120
(JEL)

COMPLAINT

Plaintiff, Fruehauf Corporation, complaining of the defendants, by its attorneys, Conboy, Hewitt, O'Brien & Boardman, respectfully shows to this Court and alleges:

AS AND FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANTS SEATRAIN LINES, INC. AND STRICK CORPORATION.

FIRST: At all times hereinafter mentioned, plaintiff Fruehauf Corporation was and still is a corporation incorporated under the laws of the State of Michigan, having its principal place of business in the State of Michigan.

SECOND: Upon information and belief, at all times hereinafter mentioned, the defendant Seatrain Lines, Inc. was and still is a corporation incorporated under the laws of the State of Delaware, having its principal place of business in a State other than the State of Michigan.

COMPLAINT

THIRD: At all times hereinafter mentioned, the defendant Seatrain Lines, Inc. was and still is authorized to do and doing business in the State of New York and within the jurisdiction of this Court.

FOURTH: Upon information and belief, at all times hereinafter mentioned, the defendant Strick Corporation was and still is a corporation incorporated under the laws of the State of Pennsylvania, having its principal place of business in a State other than the State of Michigan.

FIFTH: At all times hereinafter mentioned, the defendant Strick Corporation was and still is authorized to do and doing business in the State of New York and within the jurisdiction of this Court.

SIXTH: The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000), and there is diversity if citizenship between the parties.

SEVENTH: Jurisdiction is founded on the diversity of citizenship of the parties and the amount in controversy.

EIGHTH: On or about the 6th day of February, 1964, plaintiff Fruehauf Corporation leased to the defendant Seatrain Lines, Inc. by written agreement certain equipment consisting of the following:

COMPLAINT

1. 88 New Strick 040TE35MKIIIR 40 ft. Flexi-Van Refrigerated Containers with Refrigeration Units. B-9401 to B-9488 Inc.

2. 12 New Strick 040TE35MKIIIRMR 40 ft. Flexi-Van Refrigerated Containers with Meat Rails and Refrigeration Units. B-9489 to B-9500 Inc.

3. 25 Diesel Motor Generators.

4. 100 New Strick 700SB Mark III tandem axle Sliding Bogies on 10.00 x 20 level nylon tires. P-568801 to P-568900 Inc.

The agreement provided the terms of the rental payments to be made by defendant Seatrain Lines, Inc. as lessee to the plaintiff as lessor and provided that the plaintiff as lessor would have the right to assign the lease and the rentals reserved thereunder, including all rights and remedies possessed or available to the lessor. The agreement further provided that the defendant Seatrain Lines, Inc. as lessee would keep the equipment in good repair and operating condition and would return the equipment leased to the plaintiff as lessor on November 30, 1972 in the same condition and state of repair as when the equipment was delivered to defendant Seatrain Lines, Inc., ordinary wear and tear excepted.

COMPLAINT

NINTH: By writing dated March 9, 1964, the aforesaid lease was amended to change certain specifications and to change the amount of monthly payments.

TENTH: By writing dated January 27, 1965, the lease was further amended to change the monthly payments and to add an additional fifteen (15) Diesel generators to the equipment leased.

ELEVENTH: On December 31, 1964, by written agreement, dated December 15, 1964 plaintiff sold to Fruehauf Finance Company all its right, title and interest in the aforesaid lease and all its right, title and interest in the equipment leased by plaintiff to defendant Seatrain Lines, Inc. pursuant to said lease.

TWELFTH: By written agreement dated December 4, 1972, Fruehauf Finance Company sold to plaintiff all its right, title and interest in the aforesaid lease and all its right, title and interest in the equipment leased to the defendant Seatrain Lines, Inc. pursuant to said lease.

THIRTEENTH: Defendant Seatrain Lines, Inc. has failed to deliver to the plaintiff the equipment which was the subject of the aforesaid lease although duly demanded to do so by the plaintiff, and has unlawfully delivered the equipment to defendant Strick Corporation.

COMPLAINT

FOURTEENTH: The value of said equipment is approximately One Hundred Thousand Dollars ($100,000).

FIFTEENTH: By reason of the aforesaid, the defendants, or either of them, has converted the aforesaid equipment to its use or their use to the detriment and damage of the plaintiff. By reason thereof, plaintiff has been damaged in the sum of One Hundred Thousand Dollars ($100,000).

AS AND FOR A SECOND CAUSE OF ACTION ON BEHALF OF PLAINTIFF AGAINST DEFENDANT SEATRAIN LINES, INC.

SIXTEENTH: Plaintiff repeats, reiterates and re alleges each and every allegation contained in paragraphs FIRST through FOURTEENTH, inclusive, of the first cause of action, with the same force and effect as if hereinafter set forth at length.

SEVENTEENTH: Defendant Seatrain Lines, Inc. has breached its contract with plaintiff by failing to deliver the equipment to the plaintiff at the expiration of the lease and by modifying the certain portions of the equipment in violation of the lease.

EIGHTEENTH: By reason thereof plaintiff has been damaged in the sum of One Hundred Thousand Dollars ($100,000).

COMPLAINT

AS AND FOR A THIRD CAUSE OF ACTION AGAINST DEFENDANT STRICK CORPORATION.

NINETEENTH: Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs FIRST through FOURTEENTH, inclusive, of the first cause of action with the same force and effect as if hereinafter set forth at length.

TWENTIETH: Defendant Strick Corporation has unlawfully induced defendant Seatrain Lines, Inc. to breach its contract with the plaintiff by inducing defendant Seatrain Lines, Inc. to turn over to Strick Corporation the equipment which said defendant was required by its contract with the plaintiff to turn over to the plaintiff on November 30, 1972.

TWENTY-FIRST: By reason thereof plaintiff has been damaged in the sum of One Hundred Thousand Dollars ($100,000).

WHEREFORE, plaintiff damands judgment against the defendants, jointly and severally, on the first cause of action in the sum of One Hundred Thousand Dollars, against defendant Seatrain Lines, Inc., on the second cause of action in the sum of One Hundred Thousand Dollars ($100,000), and

COMPLAINT

against defendant Strick Corporation on the third cause of action in the sum of One Hundred Thousand Dollars ($100,000) together with costs and disbursements.

Dated: New York, N.Y.
January 8, 1973

CONBOY, HEWITT, O'BRIEN & BOARDMAN

By _____
David J. Mountan, Jr.
Member of the Firm
Attorney for Plaintiff
20 Exchange Place
New York, New York 10005
(212) 344-3131

ANSWER.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FRUEHAUF CORPORATION, Plaintiff, -against- SEATRAIN LINES, INC. and STRICK CORPORATION, Defendants.	(R.L.C.) ANSWER 73 Civ. 126 DEFENDANTS DEMAND A TRIAL BY JURY

Defendants, by their attorneys Simpson Thacher & Bartlett, for their answer to the complaint herein, allege:

AS AND FOR THEIR ANSWER TO THE FIRST ALLEGED CAUSE OF ACTION

1. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph "FIRST" of the complaint.

2. Deny each and every allegation contained in Paragraph "THIRD" of the complaint.

3. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs "SIXTH" and "SEVENTH" of the complaint.

BEST COPY AVAILABLE

ANSWER

4. Deny each and every allegation contained in Paragraph "EIGHTH" of the complaint except admit the existence of the agreement referred to therein and respectfully refer to the agreement for the true and correct terms thereof.

5. Deny each and every allegation contained in Paragraph "NINTH" of the complaint except admit the existence of the amendment referred to therein and respectfully refer to the amendment for the true and correct terms thereof.

6. Deny each and every allegation contained in Paragraph "TENTH" of the complaint except admit the existence of the amendment referred to therein and respectfully refer to the amendment for the true and correct terms thereof.

7. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs "ELEVENTH" and "TWELFTH" of the complaint except deny that either plaintiff or Fruehauf Finance Company ever had or now have any right, title and interest in the equipment referred to therein.

8. Deny each and every allegation contained in Paragraph "THIRTEENTH" of the complaint.

ANSWER

9. Deny each and every allegation contained in Paragraph "FOURTEENTH" of the complaint, and, in further answer to Paragraph "FOURTEENTH", allege that the value of the equipment referred to therein is less than $100,000.

10. Deny each and every allegation contained in Paragraph "FIFTEENTH" of the complaint.

AS AND FOR DEFENDANT SEATRAIN LINES, INC.'S ANSWER TO THE SECOND ALLEGED CAUSE OF ACTION

11. In answer to the allegations contained in Paragraph "SIXTEENTH" of the complaint, repeats, reiterates and realleges its answers to Paragraphs "FIRST" through "FOURTEENTH" of the complaint.

12. Denies each and every allegation contained in Paragraphs "SEVENTEENTH" and "EIGHTEENTH" of the complaint.

AS AND FOR DEFENDANT STRICK CORPORATION'S ANSWER TO THE THIRD ALLEGED CAUSE OF ACTION

13. In answer to Paragraph "NINETEENTH" of the complaint, repeats, reiterates and realleges its answers to Paragraphs "FIRST" through "FOURTEENTH" of the complaint.

14. Denies each and every allegation contained in Paragraphs "TWENTIETH" and "TWENTY-FIRST" of the complaint.

ANSWER

AS AND FOR A FIRST
AFFIRMATIVE DEFENSE

15. The complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND
AFFIRMATIVE DEFENSE

16. Some or all of plaintiff's claims are barred by the Statute of Limitations.

WHEREFORE, defendants demand judgment dismissing the complaint, together with their costs and disbursements in the premises.

Dated: New York, New York
April 2, 1973

SIMPSON THACHER & BARTLETT

By _____
A Member of the Firm

Attorneys for Defendants
Office and P. O. Address
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

PRE-TRIAL ORDER.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

FRUEHAUF CORPORATION,	:	
Plaintiff,	:	Civil Action File No. 73 Civ. 120 (RLC)
-against-	:	
SEATRAIN LINES, INC. and STRICK CORPORATION,	:	PRE-TRIAL ORDER
Defendants.	:	

----------X

The attorneys for the parties having met at the direction of the Court pursuant to Rule 16 of the Federal Rules of Civil Procedure, the following action was taken:

1. The pleadings were deemed amended in accordance with the framing of the issues in this action in paragraph 9 of this Pre-Trial Order.

2. The parties agreed that the trial of this action shall be based upon this Order and upon the pleadings as amended thereby.

3. (a) The parties stipulate that the following facts are not in dispute in this action (each party reserving the right to object to the materiality of any such stipulated fact and its relevancy to the issues).

PRE-TRIAL ORDER

(1) At all the times mentioned in the complaint and particularly on or after January 8, 1973, plaintiff Fruehauf Corporation was and still is a corporation incorporated under the laws of the State of Michigan, being a citizen of and having its principal place of business in the State of Michigan.

(ii) At all the times mentioned in the complaint and particularly on or after January 8, 1973, defendant Seatrain Lines, Inc. was and still is a corporation incorporated under the laws of the State of Delaware, being a citizen of and maintaining its principal place of business in a State other than the State of Michigan.

(iii) At all times mentioned in the complaint and particularly on or after January 8, 1973, defendant Strick Corporation was and still is a corporation incorporated under the laws of the State of Pennsylvania, being a citizen of and having its principal place of business in a State other than the State of Michigan.

(iv) The matter in controversy herein exceeds, exclusive of interest and costs, the sum of Ten Thousand and no/100 Dollars ($10,000.00), and there is diversity of citizenship between the parties, and proper venue in this Court.

(v) By order issued on May 28, 1965, the Federal Trade Commission required Fruehauf Corporation to divest itself of certain of its assets, more fully described in that order.

(vi) By order dated January 21, 1966, the United States Court of Appeals for the Seventh Circuit modified the order of the Federal Trade Commission issued on May 28, 1965, said order providing, inter alia:

"IT IS ORDERED THAT

"(A) Respondent, the Fruehauf Corporation, a corporation, and its officers, directors, agents, representatives, and employees shall, within one (1) year from the date of this order, divest itself absolutely, in good faith, of all assets of its Strick Trailers Division and such other assets as may be necessary to restore The Strick Company and Strick Plastics Corporation as a going concern and effective competitor in all the lines of commerce in which it was engaged immediately prior to its acquisition by respondent.

"As used in this order, 'assets' shall include any properties, rights and privileges, tangible and intangible, including but not limited to all plants, machinery, equipment, contract rights, patents, licenses, trade names, trademarks and good will of whatever description."

(vii) The value of the equipment leased under the lease, dated February 6, 1964, as amended, on November 30, 1972 was between $90,000 and $100,000.

(b) It is the plaintiff's contentions:

(1) On February 6, 1964 plaintiff Fruehauf Corporation by its Strick Division leased to defendant Seatrain Lines, Inc. for a period of 96 months, commencing on December 1, 1964, the following equipment:

1. 88 New Strick 040TE35MKIIIR 40 ft. Flexi-Van Refrigerated Containers with Refrigeration Units. B-9401 to B-9488 Inc.

2. 12 New Strick 040TE35MKIIIRMR 40 ft. Flexi-Van Refrigerated Containers with Meat Rails and Refrigeration Units. B-9489 to B-9500 Inc.

3. 25 Diesel Motor Generators.

4. 100 New Strick 700SB Mark III tandem axle Sliding Bogies on 10.00 x 20 level nylon tires. P-568801 to P-568900 Inc.

(2) The lease of February 6, 1964 provides, inter alia, that the plaintiff as lessor had the right to assign the lease and the rentals reserved thereunder, including all rights and remedies possessed or available to the lessor.

(3) Said agreement further provided that defendant Seatrain Lines, Inc., as lessee, would keep the equipment in good repair and operating condition and would return the equipment leased to the plaintiff, as lessor, on November 30, 1972 in the same condition and state of repair as when the equipment was delivered to defendant Seatrain Lines, Inc., ordinary wear and tear excepted.

(4) By writing dated March 9, 1964, the aforesaid lease of February 6, 1964 was amended to change certain specifications and to change the amount of monthly payments. By writing dated January 27, 1965, the lease was further amended to change the monthly payments and add an additional fifteen (15) Diesel Generators to the equipment leased. Otherwise the provisions contained in the lease of February 6, 1964 remained unchanged.

(5) By writing dated December 15, 1964, between The Prudential Insurance Company of America (Prudential) and Fruehauf Finance Company (Finance), Finance was authorized to purchase from Fruehauf Corporation (Fruehauf) certain accounts which were being internally converted by Fruehauf from lease paper to contract paper. By writing dated December 15, 1964 between Finance and Fruehauf, Finance purchased from Fruehauf the lease dated February 6, 1964, as amended, which lease was internally converted by Fruehauf into a contract.

(6) On or about December 31, 1964, Finance purchased from Fruehauf all of Fruehauf's right, title and interest in the lease, dated February 6, 1964, as amended, and all the right, title and interest of Fruehauf in the equipment leased by Fruehauf to defendant Seatrain Lines, Inc., pursuant to the said lease.

(7) On January 11, 1965, Finance advised the Strick Division of Fruehauf that it had cancelled certain leases, including the lease of February 6, 1964, as amended, between Fruehauf and Seatrain Lines, Inc. through the month of December 1964 and that it had debited the account of the Strick Division of Fruehauf by reason of such cancellations. That on or about January 8, 1965, Finance advised the Strick Division of Fruehauf that it had purchased such leases, internally converted into

contracts, in December 1964 and that it was crediting the account of the Strick Division with the full purchase price of such contracts.

(8) As of January 11, 1966 any residual of the lease of February 6, 1964, as amended, and any residual in the equipment which was the subject of such lease was the property of Finance and not of Fruehauf, nor of its Strick Division.

(9) By agreement made as of January 11, 1966, Fruehauf, with the approval of the Federal Trade Commission sold those assets of Fruehauf devoted to the business of the Strick Division more particularly described in Section 2 of such agreement, to a new corporation known as Strick Trailer Corporation, which subsequently changed its name to Strick Corporation, one of the defendants in this action.

(10) In any event the sale by Fruehauf to Strick Trailer Corporation by the agreement made as of January 11, 1966 did not include any right, title or interest that Fruehauf may have had in the lease of February 6, 1964, as amended, or any right, title or interest that Fruehauf may have had in the equipment which was the subject of such lease and Strick Trailer Corporation, now defendant Strick Corporation, did not pay for nor did it acquire any right, title or interest to the lease, dated

February 6, 1964, as amended, or to any residual therein nor did it pay for or acquire any right, title or interest to the equipment which was the subject of such lease.

(11) That by written agreement, dated December 4, 1972, Finance sold to plaintiff all its right, title and interest in the aforesaid lease and all its right, title and interest in the equipment leased to defendant Seatrain Lines, Inc. pursuant to said lease.

(12) That as of November 30, 1972, the residual value of the equipment which was the subject of the aforesaid lease was $100,000.

(13) Defendant Seatrain Lines, Inc. has failed to deliver to the plaintiff the equipment which was the subject of the aforesaid lease, dated February 6, 1964, as amended, although duly demanded to do so by the plaintiff, and has disposed of certain of such equipment and retains control over all of the other equipment which is the subject of the lease dated February 6, 1964, as amended, which it has not disposed of.

(14) That defendant Strick Corporation has unlawfully induced Seatrain Lines, Inc. to breach its contract with the plaintiff by inducing defendant Seatrain Lines, Inc. to fail to turn over to the plaintiff the equipment which was the

subject of said lease and which defendant Seatrain Lines, Inc. was required by its contract to turn over to the plaintiff on November 30, 1972.

The following are all of the plaintiff's claims for damages to date:

Value as of November 30, 1972 of equipment which was the subject of the lease of February 6, 1964, as amended	$100,000
Interest at 7 1/2% from November 30, 1972	Unknown

(c) It is the defendants' contentions:

(1) The "Seatrain lease" was negotiated by employees of the Strick Division and was executed by Martin Bachman, a Vice President of the Strick Division.

(2) The equipment covered by the Seatrain lease was designed and produced by the Strick Division.

(3) The equipment covered by the Seatrain lease was to be returned to the Strick Division at 225 Lincoln Highway, Fairless Hills, Pa.

(4) The equipment covered by the Seatrain lease was used in the operation of and devoted to the Strick Division.

(5) There was no effective assignment of the Seatrain lease to Finance.

(6) Neither the Strick Division nor Seatrain received notice of any purported assignment.

(7) Treatment of the Seatrain lease as a sale was done by Fruehauf solely for internal accounting purposes and was not intended to and does not in fact have any effect on the substantive rights of the parties.

(8) Subsequent to January 11, 1966, the motor vehicles covered by the Seatrain lease were registered with the State of Maine by the Strick Corporation as lessor. Fruehauf never registered such vehicles with the appropriate authorities.

(9) Had the Federal Trade Commission and the United States Court of Appeals for the Seventh Circuit not ordered Fruehauf to divest itself of the Strick Division, the equipment covered by the Seatrain lease would have been returned to the Strick Division at the expiration of the lease.

(10) The residual of the Seatrain lease and the residual of the equipment covered thereby was sold to Strick Trailer Corporation, later known as the Strick Corporation, pursuant to contract of sale, dated January 11,1966. Any contrary holding would violate public policy as expressly stated in the order of the United States Court of Appeals for the Seventh Circuit dated June 21, 1966.

4. (a) The exhibits which each party now expects to offer at the trial are identified in subdivision (b) hereof. Should any party hereafter decide to offer additional exhibits,

prompt notice of that fact shall be given to each other party and to the Court by serving and filing a supplemental pre-trial memorandum. The supplemental pre-trial memorandum may be in a short form statement filed with the Deputy Clerk for Calendars, unless served at trial, when it is to be filed with the Trial Judge. It shall set forth the reason why the exhibit was not theretofore identified. No exhibit shall be offered at trial unless identified in such pre-trial order or in a supplemental pre-trial memorandum.

(b) The parties agree that the following documents which were marked for identification or which are otherwise identified in this Order are authentic and may be received in evidence (each party reserves the right to object to the materiality or relevancy of each document preceded by the letter "A", and each party reserves the right to object to all or a portion of each document preceded by the letter "B" on the ground that it is inadmissible under the hearsay rule).

Equipment lease, dated February 6, 1964, between Strick Division, Fruehauf Corporation, lessor, and Seatrain Lines, Inc., lessee.

Amendment dated March 9, 1964, of the lease, dated February 6, 1964.

Amendment, dated January 27, 1965, of lease, dated February 6, 1964.

PRE-TRIAL ORDER

A&B Consent agreement, dated December 15, 1964, between Fruehauf Finance Company and The Prudential Insurance Company of America.

A&B Agreement, dated December 15, 1964, between Fruehauf Finance Company and Fruehauf Corporation together with assignment, dated December 15, 1964, and list of customer instalment receivables - Account 1111 Assigned.

Computation of loan value on lease loan in connection with lease from Fruehauf to Seatrain, dated February 6, 1964, as amended.

A&B Finance Company remittance schedule showing leases to be cancelled on December 31, 1964.

A&B Notes Receivable Trial Balance, dated December 31, 1964, showing leased/new business.

A&B Finance Company Journal Voucher 12-6A dealing with 13 leases appearing on above remittance schedule showing leases to cancel.

A&B Notes Receivable Trial Balance, dated December 31, 1964, showing Seatrain as contract 33-9017T with a principal of $1,338,240.69.

A&B General Ledger - Account No. 1571 for December 1964 including Item 165 showing a debit on December 31, 1964 of $1,644,112.91, showing from the cancellation of the 13 leases shown on the remittance schedule above the leases to be cancelled.

A&B Debit memo. No. 35497, dated December 31, 1964, debiting account of Fruehauf Corporation for leases cancelled December 1964.

A&B Letter, dated January 11, 1965, from Mr. L.A. Shipan of Finance to Mr. Lloyd Leatherman, Regional Finance Manager, Strick Division, advising of leases cancelled during the month of December 1964.

PRE-TRIAL ORDER

A&B	Deposition of defendant Strick, by Martin Bachman.
A&B	Deposition of defendant Strick Corporation by Harry Shapiro.
A&B	Tabulation, dated December 1964, showing cancellations of leases.
A&B	Credit memo. No. 44073, dated December 31, 1964 crediting account of Fruehauf Corporation for contracts purchased in December 1964.
A&B	Journal Voucher recording the so-called second closing in December 1964 - JV 12-10.
A&B	Journal Voucher No. 12-10B for month of December 1964 showing transfer of Fruehauf Corporation 1111 Note Accounts to Fruehauf Finance Co. together with the supporting documentation including Notes Receivable Trial Balance, dated December 31, 1964 and unmarked paper.
A&B	All papers and documents marked as exhibits for identification on the depositions taken by the defendants and plaintiff.
A&B	Deposition of plaintiff Fruehauf Corporation by Adolph T. Silverstein.
A&B	Deposition of plaintiff by Ernest L. Rushmer.
A&B	Strick Division, Fruehauf Corporation General Ledger Trial Balance, dated June 30, 1965.
A&B	Correspondence with respect to Milwaukee Motor Transport Co. lease.
A&B	Lease Transmittal Schedule of December 1972.
A&B	Assignment dated December 4, 1972 from Finance to Fruehauf.

PRE-TRIAL ORDER

A&B Documents with respect to registration of motor vehicles covered by Seatrain lease with State of Maine.

A&B Order of Federal Trade Commission, dated May 28, 1965.

5. The parties agree that the witnesses whom each party now intends to call are those listed below. Should any party hereafter decide to call any additional witnesses, prompt notice of their identity shall be given to each party and to the Court by serving and filing a supplemental pre-trial memorandum. The supplemental pre-trial memorandum may be in a short form statement filed with the Deputy Clerk for Calendars unless served at trial, when it is to be filed with the Trial Judge. It shall set forth the reason why the witness was not theretofore identified. No witness may be called at trial unless identified in this pre-trial Order or in a supplemental pre-trial memorandum.

Plaintiff's Witnesses:

Ernest L. Rushmer
Adolph T. Silverstein
Witnesses to testify as to records, if necessary.
Robert D. Rowan
Representative of Arthur Andersen & Co.
Robert Totzke
Alden W. Shultz
William E. Grace
Clark E. Abbott
T. Reghanti
V. Traise
L. Shipan
Fred Schwab of Touche Ross

PRE-TRIAL ORDER

Defendants' Witnesses:

Martin Bachman
Soloman Katz
Harry Shapiro
Leonard Barkan
William Weber
Witnesses to testify as to records, if necessary.

6. Plaintiff agrees to call not more than one accounting or financial expert other than employees of plaintiff. Defendant agrees to call not more than one accounting or financial expert other than employees of the defendants.

7. The following are all of the claims for damages or for relief asserted by the plaintiff in this action:

Value as of November 30, 1972 of equipment not returned to the plaintiff	$100,000
Interest at 7 1/2% from November 30, 1972 to date of trial	Unknown

8. The parties also agree on the following matters:

(a) The parties agree to waive a trial by jury and consent to the trial of the issues in this action before Hon. Robert L. Carter, United States District Judge, without a jury.

(b) Plaintiff at this time expects to require two trial days; defendants at this time expect to require two trial days.

9. (a) The ultimate issues to be tried are contended by the plaintiff to be as follows:

PRE-TRIAL ORDER

(1) Did Fruehauf Corporation in or about December 1964 and January 1965 sell to Fruehauf Finance Company all its right, title and interest to the lease, dated February 6, 1964, as amended?

(2) Was the residual of the lease, dated February 6, 1964, as amended, and the residual in the equipment which was the subject thereof sold by Fruehauf Corporation to Strick Trailer Corporation, now Strick Corporation, by the agreement of January 11, 1966?

(3) What are the plaintiff's damages?

(b) The ultimate issues to be tried are contended by the defendants to be as follows:

(1) Was the residual of the lease, dated February 6, 1964, as amended, and the residual in the equipment which was the subject thereof sold by Fruehauf Corporation to Strick Trailer Corporation, now Strick Corporation, by the agreement of January 11, 1966?

(2) What are the plaintiff's damages, if any?

Dated: New York, N.Y.
June 17, 1974

SO ORDERED

Robert L. Carter

United States District Judge

PRE-TRIAL ORDER

CONSENTED TO:

Attorneys for Plaintiff

Attorneys for Defendants

AMENDMENTS TO PRE-TRIAL ORDER.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FRUEHAUF CORPORATION, Plaintiff,	:	Civil Action File No. 73 Civ. 120 (RLC)
-against-	:	
SEATRAIN LINES, INC. and STRICK CORPORATION, Defendants.	:	AMENDMENTS TO PRE-TRIAL ORDER

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the Pre-Trial Order of this Court, dated June 17, 1974, be amended in the following particulars:

1. Plaintiff wishes no longer to be bound by the stipulation contained in Paragraph 3(a)(vii) of the Pre-Trial Order. Defendants contend that that stipulation, in the form of a Court Order, constitutes a judicial admission as to the value of the equipment in question on November 30, 1972 and is binding on the plaintiff.

AMENDMENTS TO PRE-TRIAL ORDER

2. Paragraph 3(b)(12) of the Pre-Trial Order shall be amended to read as follows:

> "That as of November 30, 1972, the residual value of the equipment which was the subject of the aforesaid lease was $400,000."

3. Paragraph 3(b)(14) of the Pre-Trial Order shall be amended to read as follows:

> "That defendant Strick Corporation has unlawfully induced Seatrain Lines, Inc. to breach its contract with the plaintiff by inducing defendant Seatrain Lines, Inc. to fail to turn over to the plaintiff the equipment with was the subject of said lease and which defendant Seatrain Lines, Inc. was required by its contract to turn over to the plaintiff on November 30, 1972.
>
> The following are all of the plaintiff's claims for damages to date:

Value as of November 30, 1972 of equipment which was the subject of the lease of February 6, 1964, as amended	$400,000
Interest at 7 1/2% from November 30, 1972	Unknown"

4. Paragraph 3(c) of the Pre-Trial Order shall be amended to add, as subparagraph (11), the following:

> "The value of the equipment in question on November 30, 1972, was approximately $98,000.

AMENDMENTS TO PRE-TRIAL ORDER

5. Paragraph 4(b) of the Pre-Trial Order shall be amended to add to the documents the following:

"A&B Deposition of Clark E. Abbott
A&B Deposition of W.J. Hadley
A&B Deposition of Joseph A. Puchino"

6. Paragraph 5 of the Pre-Trial Order shall be amended to list the following additional plaintiff's witnesses:

"W.J. Hadley
Leo Mellam
O.I.M. Porton
Charles Peters"

and to list the following additional defendants' witnesses:

"Joseph A. Puchino
Bernard Rensel
Jilco Equipment Inc.
100 Franklin
Croydon, Pennsylvania

Paragraph 5 of the Pre-Trial Order shall be further amended to add the following:

Plaintiff will make Mr. Hadley available to the defendants for the completion of his deposition prior to the commencement of the trial. At or prior to the continuation of Mr. Hadley's deposition, plaintiff will produce for defendants' inspection documents and records of whatever type or description in plaintiff's possession or under its control bearing upon the value of the equipment in question on November 30, 1972.

AMENDMENTS TO PRE-TRIAL ORDER

7. Paragraph 7 of the Pre-Trial Order shall be amended to read as follows:

"The following are all of the claims for damages or for relief asserted by the plaintiff in this action:

Value as of November 30, 1972 of equipment not returned to the plaintiff	$400,000
Interest at 7 1/2% from November 30, 1972 to date of trial	Unknown"

8. Defendants' consent to these amendments to the Pre-Trial Order is without prejudice to their position, as stated in paragraph 1 hereof, that plaintiff is bound by its judicial admission as to the value of the equipment in question on November 30, 1972.

Dated: New York, New York
December 12, 1975

CONBOY, HEWITT, O'BRIEN & BOARDMAN

By _____
A Member of the Firm
Attorneys for Plaintiff

SIMPSON THACHER & BARTLETT

By _____
A Member of the Firm
Attorneys for Defendants

SO ORDERED: 12/12/75

_____
U.S.D.J.

TRANSCRIPT.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - -x

FRUEHAUF CORP.,

Plaintiff,

- against - 73 Civ. 120

SEATRAIN LINES, Inc., and
STRICK CORPORATION,

Defendants.

- - - - - - - - - - - - - - - - - -x

B e f o r e:

HONORABLE J. EDWARD LUMBARD,

Circuit Judge.

New York, New York
December 8, 1976 - 10:00 a.m.

A p p e a r a n c e s:

CONBOY, HEWITT & O'BRIEN, Esqs.
Attorneys for Plaintiff
BY: JAMES PRATT, Esq., and
TIMOTHY C. QUINN, Esq., of Counsel.

SIMPSON THACHER, Esq.
Attorney for Defendants
BY: MELVYN L. CANTOR, Esq., and
BRIAN T. NAYLOR, Esq., of Counsel.

(Case called)

THE COURT: Proceed.

MR. PRATT: Do you want an opening statement or shall I call my first witness?

THE COURT: I will leave that to whatever counsel wishes.

MR. PRATT: I will make a brief opening statement, your Honor.

This case is a relatively simple case, involving the lease of certain trailer trucks by Seatrain Lines from plaintiff, Freuhauf Corporation.

The lease called for certain payments to be made as rental and the return of the equipment at the end of the lease term, which was December 1972. It was an eight-year lease.

The agreement further provides that it cannot be changed except in writing by mutual consent of the parties.

Defendant Seatrain Lines paid, as was called for under the lease, throughout the entire term. On one occasion it in effect returned some damaged equipment and at the termination of the lease, when the great bulk of the equipment leased was due back from Seatrain Lines, it converted it to its own use.

1 That is the first issue as to liability.

2 The second issue is damages. The plaintiff

3 maintains it has been damaged in the amount of $400,000

4 plus interest and costs, said $400,000 being the value of

5 that equipment in December 1972, the fair market value

6 at the conclusion of the lease.

7 By way of background, because it's going to

8 be an issue in the case, Freuhauf Corporation was ordered

9 by the Federal Trade Commission to divest itself of certain

10 assets it owned. These assets were also assets which had

11 formerly belonged to a corporation that was purchased by

12 Freuhauf and was known within Freuhauf and without

13 Freuhauf as the Strick Division. It was not a separate

14 corporate entity; it was part of the Freuhauf Corporation.

15 It's nomenclature was "Strick." It participated to some

16 extent in the negotiations of this lease.

17 By contract dated January 11, 1966, Freuhauf

18 did sell to a group certain of the assets of Strick

19 Division in compliance with the order of divestiture -- well,

20 the Federal Trade Commission.

21 At issue here is whether under that contract,

22 not the leases, but the residual of the equipment -- and

23 I use the term generically -- passed, or the right to

24 the residual value of the equipment passed to the new

entity known as Strick Corporation, or whether it remained, as other assets did, within Freuhauf Corporation.

One of the factors in that issue is whether or not this residuary value or equipment was necessary for the operation of the new Strick enterprise, the new company.

That is about as far as I would like to go on my opening statement.

THE COURT: Does defense counsel wish to say something at this point?

MR. CANTOR: I may make a brief response by way of opening. I don't really disagree with Mr. Pratt in the statement of the issues, but I might point out a few factors.

By way of background, the Strick company, which was a privately held company, a family business, was acquired by Freuhauf in 1956 for $11 million. Almost immediately thereafter, the FTC issued a complaint against that acquisition as well as certain others that Freuhauf made.

The proceedings before the Federal Trade Commission concluded on May 28, 1965, when in an opinion by Commissioner Elman, the FTC ordered the divestiture of the Strick Division and the Hobbs Division as well.

There then commenced an appeal by Freuhauf,

together with negotiations with the FTC, to settle the matter as well as negotiate with third persons in compliance with whatev r the FTC would go along with to divest itself of something.

What was finally worked out was a settlement certified by the Seventh Circuit in an order issued that all assets -- and the quote is in our trial memorandum; it's in the broadest possible language -- tangible and intangible property rights, so on and so on, all assets of the Strick Division were to be divested. The quid pro quo for that, was that the FTC opinion with respect to the Hobbs Division, (the other division that the FTC ordered Freuhauf to divest), that order was modified and Freuhauf was allowed to keep the Hobbs Division.

It was in that context that the purchase agreement, which will be in evidence and contains the actual language we are fighting about, it was in that context that the agreement was negotiated and was executed and in fact was approved by the Federal Trade Commission as part of the settlement proposal.

Now, the operative language we contend in the purchase agreement itself refers to the sale of assets including movable equipment used in the operation of the Strick Division, whether or not given a carrying value on

the balance sheet; and the fact it did not have to be given a carrying value on the balance sheet was reflected by the purchase price, which was balance sheet net worth of approximately $21 1/2 million plus $17 million over and above the balance sheet for items that were not given a carrying value on the balance sheet, the total purchase price being 38 1/2 or $39 million.

It is our position that the residual of this lease was an asset of the Strick Division. The lease itself was negotiated by the Strick Division. The equipment was designed by the Strick Division. The equipment was to be returned to the Strick Division of Freuhauf Corporation. The Strick Division at all times before and after the divestiture exercised ownership over the equipment.

For example, there will be testimony that the bogies, which are the wheels that go under the equipment which are motor vehicles, were registered both before and after the purchase agreement, listing first the Strick Division of Freuhauf as owner, and after the purchase, listing the Strick Corporation, the new corporation, as owner.

At all times the Freuhauf Finance Company, which plaintiff will contend got certain rights to this

equipment, never exercised those rights, both during the period prior to the divestuture, which we contend constituted an admission by Freuhauf that it was Strick Division property and also subsequently, which was at least probative of the issue.

Let me say a word on the question of valuation. The plaintiff's position throughout the litigation, as well as the defendants' position, has been that the equipment was worth $100,000. That was the prayer -- $100,000, Judge. That had been the prayer in the complaint. That had been what was stipulated in the original pretrial order. In fact, in 1972, when the residual came due because the lease was paid off, Strick disposed of the equipment for a total consideration of $98,000, which was very close to plaintiff's prayer of $100,000.

About two and a half years after the lawsuit was commenced, after discovery was originally closed, after the pretrial order was entered, plaintiff first claimed the equipment was worth $400,000.

Our position, if your Honor should reach that issue, which we submit you should not, is that plaintiff was right the first time, not the second time.

Your Honor, by the way, my name is Cantor. This is Brian Naylor, who will be with me on the case, and

we are with Simpson Thacher & Bartlett, and we represent both defendants.

THE COURT: Very well.

MR. PRATT: I would like to call Mr. Adolph T. Silverstein to the stand.

A D O L P H T. S I L V E R S T E I N, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PRATT:

Q Mr. Silverstein, could you briefly describe your employment and educational background to the Court.

A I went to the University of Michigan. I got a Bachelor of Business Administration degree in 1949. I joined the public accounting firm of Touche, Ross & Company immediately upon graduation. I worked for them through 1954.

In 1955, I joined Freuhauf Corporation as a staff accountant. In October of 1965 I became the company controller, which position I hold today.

Q As a controller, are you an officer of the corporation?

A Yes, sir.

Q Are you a Certified Public Accountant?

A Yes, sir.

Q Could you describe briefly your responsibilities within the Freuhauf Corporation since you became controller in 1965?

A I am responsible for the general accounting. I am responsible for the tax department, the data processing department, payroll department, internal audit department, all those functions.

Q As a staff accountant, what were your duties?

A In general, I would work on special assignments, which could be almost anything. I had no day-to-day type duties.

Q I am going to show you a document which has already been marked Plaintiff's Exhibit 1, and I am going to ask you to examine it carefully and tell the Court whether or not you are familiar with the document.

A Yes, sir.

MR. PRATT: I am going to offer this document in evidence. It has already been marked as Plaintiff's Exhibit 1.

MR. CANTOR: I have no objection to the offer, but you might describe it.

THE COURT: Has the document been marked?

THE CLERK: They have been premarked.

(Plaintiff's Exhibit 1 for identification received in evidence.)

Q Would you please describe what this document is, briefly?

A It is the underlying equipment lease between Seatrain and Freuhauf covering the equipment at issue.

Q When you say "Seatrain" --

A Seatrain Lines, Inc., who was the lessee, and Strick Division, Freuhauf Corporation, lessor.

Q Was Strick Division a separate corporate entity within Freuhauf Corporation at any time?

A No, sir.

Q So then is it your testimony that the lessor of this equipment is actually Freuhauf Corporation?

A Yes.

MR. CANTOR: I will object to the form. I don't think the gentleman is an attorney.

The document speaks for itself and the conclusions your Honor can draw.

THE COURT: You don't contest this?

MR. CANTOR: At the time the lease was entered into, it was Strick Division, a division of Freuhauf Corporation.

MR. PRATT: Your Honor, I am trying to establish there was a lessor and it's Freuhauf Corporation. The nomenclature of Strick Division or anything else has really nothing to do with the entity, that is, the corporation that leased this equipment. I think that is important. If there is any quarrel with that, I would like to go into it.

THE COURT: What is it you are trying to bring out, that Strick was a division?

MR. PRATT: Strick was a division, but the actual lessor, the corporate entity that was legally bound and had the rights under the lease and the obligations under the lease was the Freuhauf Corporation with exactly the same import as Freuhauf Corporation leasing anything or buying anything. Strick Division was merely a descriptive term within the corporate entity Freuhauf Corporation, and if there is any quarrel with that, I would like to find out.

MR. CANTOR: My only point is, I don't think this witness is the proper way to establish what legal rights flowed between the parties. The document speaks for itself. I do not contest the fact that Strick Division was a division of Freuhauf Corporation.

THE COURT: Go on with the next question.

Q Does this document describe anywhere the equipment that was leased to the Seatrain Corporation?

A Yes, sir.

Q Seatrain Lines, Inc., and I will refer to that as "Seatrain."

A Yes.

Q Will you please turn to the part of this lease where that equipment is described?

A Yes.

Q What is that equipment?

A That part is an addendum A.

Q Is that addendum a five-page description of the specifics of the equipment that was leased to Seatrain Lines by Freuhauf Corporation?

A Seven. The eighth page is addendum B.

MR. CANTOR: That is correct. A is seven and B is one.

Q Are the addenda to the lease the descriptive parts of the lease which describe what exactly was leased to Seatrain from Freuhauf?

A Yes, sir.

Q Briefly, what was leased by Freuhauf to Seatrain?

A 100 reefer containers, Flexi-Vans, 100 bogies and 25 diesel generator sets.

Q What are bogies?

A They are an under-construction that is separable from the body, which the body can then rest on to be transported.

Q Would you please turn to page 3 of Plaintiff's Exhibit 1, and I am referring you to paragraph 4.

MR. CANTOR: Your Honor, would you like a copy?

THE COURT: Yes, I would.

Q Mr. Silverstein, on page 3, would you please read the paragraph beginning with the number 4 and read the first seven lines of that?

A "This transaction is a leasing and not a sale, conditional or otherwise. The parties understand and agree that lessee does not acquire hereunder or by payment of rental hereunder obtained, any right, title or interest in or to said equipment or any thereof except the right to possess and use said equipment so long, and only so long as lessee shall not be in default hereunder."

Q Did Freuhauf Corporation deliver to Seatrain Lines Corporation the equipment that was called for under this lease?

A Yes.

Q All the equipment?

A Yes.

Q Did Seatrain lines accept such delivery?

A Yes.

Q Did they ever say any equipment upon delivery was defective?

A No.

Q Above 4 on page 3, would you please read subsection B?

A "Lessee shall pay all costs and expenses (including actual and reasonable attorneys' fees where recovery of same is not prohibited by law) incurred by lessor in enforcing any of the terms, provisions, covenants and indemnities provided herein."

Q You have testified that Freuhauf did deliver this equipment to Seatrain and it was accepted?

A Yes.

Q On the same page under paragraph 5, do you see it?

A Yes.

Q Please go down to line 8 therein and beginning about half way through that line, read to the end of the page.

A "Lessee agrees that upon termination of this agreement by separation, cancellation or otherwise, lessee shall return said equipment to lessor at lessor's address, hereinabove stated, at lessee's cost and expense, in the same

condition and state of repair as they were when delivered to lessee hereunder, ordinary wear and tear excepted. Lessee specifically indemnifies lessor and agrees to hold lessor harmless against all loss and damages lessor may sustain or suffer because of" --

Q No need to read the rest of it. There are various provisions in there calling for holding lessor harmless.

During the term of this lease -- and incidentally, how long was the lease for?

A Eight years.

Q During the term of this lease, which began in November of 1972 --

A November '64.

Q I am sorry. Did Seatrain, the lessee, make the payments required to be made under the lease?

A Yes, sir.

Q And to whom were these payments made?

A To Freuhauf.

Q Freuhauf Corporation?

A Yes.

Q Was there at any time any question raised by the lessee, Seatrain, as to where these payments should go?

A No, sir.

Q Was there any question at any time raised by Strick, either the Strick Division, before January 11, 1966, or the new entity, the Strick Corporation, after January 11, 1966, as to where these payments should go?

A No.

Q When did the lease -- and when I refer to the lease, I am referring to Plaintiff's Exhibit 1 -- when did this lease expire?

A December of '72.

THE COURT: December 1972?

THE WITNESS: Yes. It was an eight-year lease.

Q At the expiration of the lease term, did Seatrain Line return to Freuhauf Corporation the equipment described in that lease and leased to Seatrain?

A They did not.

Q Did Freuhauf Corporation demand the return of this equipment?

A Yes, sir.

Q Did they demand it of Seatrain Lines?

A Yes, sir.

Q Please turn to page 7 of the lease. Would you please read paragraph 13 on page 7 in its entirety?

A "This instrument contains the entire agreement between the parties pertaining to the subject matter hereof.

No agreements, representations or understandings not specifically contained herein shall be binding upon any of the parties hereto unless reduced to writing and signed by the parties to be bound thereby. The terms, covenants, conditions and provisions of this agreement may hereafter be changed, amended or modified only by an instrument in writing, specifically purporting so to do and signed by the parties to be bound thereby."

Q Was this lease at any time amended by the parties?

A Yes, sir.

Q How many amendments were there?

A Two.

Q I show you a document marked for identification Plaintiff's Exhibit 2, and ask if you are familiar with that document.

A Yes, I am.

Q Would you please describe that document very briefly?

A It's the first amendment to the contract, to the equipment lease, and it changes the rental and it changes a very limited number of the specifications.

MR. PRATT: I would request it be received in evidence as Plaintiff's 2, and I would like to tender

to the Court a copy of it.

MR. CANTOR: No objection.

*** (Plaintiff's Exhibit 2 for identification received in evidence.)

Q I show you a document consisting of two pages, which has been marked Plaintiff's Exhibit 3 for identification, and ask you if you are familiar with that document.

A Yes, I am.

MR. PRATT: I would like that received in evidence as Plaintiff's Exhibit 3, and I would tender a copy of it to the Court.

MR. CANTOR: No objection.

(Plaintiff's Exhibit 3 for identification received in evidence.)

Q Would you please describe briefly what this document, which has been received in evidence as Plaintiff's Exhibit 3, is?

A It's a document which increases the amount of diesel generators to be delivered, increases from 25 units to 40 units, and it also changes the rental charge.

Q You have testified, Mr. Silverstein, you are familiar with the lease?

A Yes.

Q Is there anything in either of those two

amendments that modifies in any way paragraph 4 on page 3 of that lease?

MR. CANTOR: Judge, the documents speak for themselves. They are in evidence. I don't think a lay witness should testify on that.

THE COURT: Yes. If you call my attention to it, that is enough, and you have done so.

MR. PRATT: Thank you, your Honor.

I would also like to show, if it becomes germane, the intent of Freuhauf Corporation, through one of its officers, in fact, one of the key officers in this Seatrain Lines - Freuhauf Corporation lease, the intent.

MR. CANTOR: All he has asked is whether document B modifies document A and my position on that is, your Honor can read the documents and Mr. Pratt can write a brief on the subject if he wants to.

MR. PRATT: I will not quarrel with that or go any further with it.

Q Were there any further amendments to the lease?

A No, sir.

Q To Plaintiff's Exhibit 1, the main lease?

A No.

Q Did there come a time when Freuhauf Corporation sold assets of the Strick Division?

A Yes, sir.

Q When did this sale take place?

A January 11, 1966, pursuant to an agreement.

Q Was this sale of assets done pursuant to an agreement?

A Yes.

Q I show you a document which has been marked for identification as Plaintiff's Exhibit 4, and I ask you to look at that carefully and please tell the Court whether or not you are familiar with that document.

A Yes, sir.

Q Is that document the January 11, 1966 agreement that you referred to just a little while ago in your testimony?

A Yes, sir.

MR. PRATT: I would ask it be received.

MR. CANTOR: I have no objection. I would like the opportunity over the lunch break to verify it. There are a number of schedules. I am sure it conforms with my copy, but I haven't had time to go through it in full.

THE COURT: Very well.

*** (Plaintiff's Exhibit 4 for identification received in evidence.)

Q By way of background, Mr. Silverstein, was

Freuhauf ordered to sell the assets of its Strick Division by the FTC?

A Yes, sir.

Q Is this document, this agreement, the outcome of that order?

A Yes.

Q Was this agreement intended to be in compliance with that order?

A Yes.

Q At any time, did the FTC raise a question as to whether or not that agreement complied with the order that it had issued to Freuhauf Corporation?

A No.

Q Was that question ever raised by any other legal body?

A No.

Q Or was it ever challenged by any civil body?

A No.

Q Or plaintiff or anybody, any party, to your knowledge?

A No.

Q Referring now to Plaintiff's Exhibit 4, the contract dated January 11, 1966, are you familiar with the contents of this contract?

A Yes, sir.

Q Did you take part in the negotiations of this contract?

A Yes, sir.

Q On whose behalf?

A Freuhauf Corporation.

Q Did anyone else take part in the negotiations of this contract on behalf of Freuhauf Corporation?

A Yes.

Q Who was that?

A Mr. Rushmer; and the basic agreement of purchase was negotiated through Mr. Grace and Mr. Katz.

Q Will you tell the Court who Mr. Grace and Mr. Katz are?

A Mr. Grace is now the chairman of the board of Freuhauf Corporation. Mr. Katz was the president of Strick Corporation.

MR. CANTOR: Could I ask there be a clarification made, because it came up in the depositions, between discussions that Mr. Grace and Mr. Katz were at, which I understand were of a global nature, and the discussions Mr. Silverstein was at? There may be some significance as to the difference between the two forms of negotiations and I would suggest that hasn't been made clear, and it

might be helpful to your Honor and to the record.

MR. PRATT: Let me make a statement and see if he agrees with me.

BY MR. PRATT:

Q Did Mr. Grace and Mr. Katz agree on the general outlines of the deal on sort of an overall global handshake basis?

A Yes.

Q Am I correct in assuming they did not sit down at the drafting table and go over the nuts and bolts and so forth?

A They very definitely did not.

Q When you say you and Mr. Rushmer participated in the negotiations, you are talking about something post this handshake deal between Mr. Grace and Mr. Katz?

A Yes.

MR. PRATT: Is that clarified?

MR. CANTOR: Yes.

Q When we talk about your participation in the negotiation of this contract and anyone else's negotiations in this contract, we are referring not to Mr. Grace's and Mr. Katz's discussions in arriving at an agreement in principle, but to your actually and Mr. Rushmer and others putting the thing together.

A Yes.

Q Would you, to the best of your recollection, describe about how long it took or how much of your time it took in connection with negotiating out the details of this agreement and putting it together?

A It took a fairly considerable amount of time. From memory, we were probably working on this for a month and a half, maybe two months even, getting all the nuts and bolts agreed upon.

Q When you say "all the nuts and bolts," would you describe briefly what you did, what you looked at, what you talked about during that time?

A The starting point was --

Q Just in your own words. Give a little narrative of it. I think it might be more helpful.

A The starting point was a balance sheet. Then, of course, we had to be on both sides comfortable with the items in the balance sheet that are subject to valuation.

I will give you a couple of good examples that were very difficult to negotiate. One was the amount of obsolescence in the inventory. The Strick people obviously would not want to pay more for the inventory than it was worth and there was a lot of discussion as to how much obsolescence there was, parts that were not used presently

in the construction process of new trailers; and the other was product warranty. Although Freuhauf Corporation was obligated to perform the warranty, we were not in a position to do so because the equipment was built by Strick and their engineers were the most capable of deciding what the proper repairs would be, so we agreed as a part of this agreement on a number of dollars that were to be allowed, in effect paid by us, to perform whatever warranty subsequently resulted, and there was a lot of haggling, I guess is as good a word as any, as to what that amount should be.

Q In other words, having arrived at a basic agreement and a basic price in which negotiations you took no part, you were then given the task by Freuhauf Corporation, you and Mr. Rushmer principally -- and correct me if I am wrong -- in getting down and making what was sold sold, the proper price and the haggling back and forth?

A Yes.

Q What was your principal area of responsibility?

A I would say the accounting and the numbers.

Q What was Mr. Rushmer's principal area of responsibility?

A I would say the legal definitions, words,

that sort of thing.

Q Other than you and Mr. Rushmer, was there any person who put in a comparable amount of time? I don't want to go into somebody that spent two days or something like that. Were you the two principal people for the Freuhauf Corporation?

A I think we were the two principal people, although some of the tax people from Touche, Ross got involved. There was a tricky patent involved.

Q It is understandable others would get involved, but you were the two principal people?

A I would say that.

Q And you referred to this one particular piece of negotiation involving valuation of equipment, so forth and so on, as an example of the type of bargaining you did?

A Yes.

Q Were there other hagglings of that nature too, without specifically going into the items?

A Yes.

Q Now, this took place, for the sake of time, in the fall of 1965, did it not?

A Yes, the very late fall. Winter would be closer, actually.

Q What was the overall purchase price of the

Strick Division assets, if you recall, roughly?

A Right at $39 million.

Q Referring back to Plaintiff's Exhibit 1 -- and you can refresh your recollection by looking at it -- what was the overall payments to be made to Freuhauf Corporation from Seatrain pursuant to that agreement as of the date it was entered into, the overall amount.

A Around a million seven, or eight.

Q What date was that again?

A That was in December of '64.

Q In the fall of 1965, approximately how much money had been paid by Seatrain to Freuhauf pursuant to that lease?

A A couple of hundred thousand dollars.

Q Then it would be fair to say, would it not, by simple arithmetic, that there was approximately 1.3 million, or whatever million dollars more, to come under that contract?

A Yes, sir.

Q You have also testified that you "haggled" over the value of assets that were to pass to the newly formed Strick entity from the Freuhauf Corporation; true?

A Yes.

Q Did you at any time discuss -- and I am talking

about you personally now -- this equipment lease with Seatrain Lines during the course of the negotiations that you were part of with Strick Division people or the Strick entity people?

A No, sir, we did not.

Q At any time?

A No, sir.

Q Are you aware of any discussions of that nature involving that lease by anyone?

A No.

Q During the time of the negotiations?

A No.

Q Was that equipment lease, Plaintiff's Exhibit 1, or any provisions therein, discussed or negotiated in any way by you or anyone to your knowledge during the time you were working on the sale of the assets of the Strick Division to the new Strick entity?

A No, sir.

Q You are quite sure of that?

A Yes, sir.

Q Was this lease, Plaintiff's Exhibit 1, sold to Strick -- the new Strick Corporation under the January 11, 1966, contract?

MR. CANTOR: Judge, that is the question you

are ultimately going to have to resolve. I don't think it is a fair question of the witness.

THE COURT: Yes.

MR. PRATT: Your Honor, I think there will be no quarrel with the fact that the lease was not sold. I think the only possible quarrel is that in some way the residual got sold, and while Mr. Silverstein is not a lawyer, he is very, very conversant with these negotiations and is capable in making a distinction as to what is sold and what is not sold since the whole business he is involved in is buying and selling things.

If you sustain the objection, I will rely on my next witness for it.

MR. CANTOR: Perhaps we can expedite this.

There is no contention by the defendants that the lease payments were sold. In other words, the payments due under the lease we admit and agree were to continue to be paid to Freuhauf, Freuhauf Finance Company; there is no dispute about that

I also would have no objection to this witness testifying, because I intend to ask my witness this: what his understanding was as to whether the lease was included, the residual was included. I would be interested in hearing what his understanding was, and I will

have some questions of him about that, but to ask him the ultimate question whether the lease itself was sold, I submit is a question your Honor should decide and not this witness.

THE COURT: Yes. I think you can live with that distinction.

MR. PRATT: I think so, your Honor. I will be glad to go through what his understanding was to each and every part of this matter.

Q Was it your understanding -- I will ask three questions about this.

Was it your understanding that this lease -- and I refer again to Plaintiff's Exhibit 1 -- was in any way connected with this contract?

A No, sir.

Q Was it your understanding that the residuals -- and by "residuals," the trailer trucks themselves, the containers and the bogies and the generator sets -- were involved in this contract?

A No, sir.

Q Was it your understanding that the lease, the residuals and anything to do with this contract, was not involved in the sale of the assets to Strick Corporation, the new Strick Corporation?

MR. CANTOR: Objection, unless it is established this man knew of the existence of the lease beforehand. I don't know how he can be asked as to an understanding of what was not involved unless he knew that the equipment in question existed, if I have made myself clear.

THE COURT: Hasn't this all been covered?

MR. PRATT: Your Honor, without trying to be very technical about the thing, sitting down at a table for a month and a half, selling a $39 million bag of assets to someone and spending a month and a half on it by an intelligent man, the controller of the company and a CPA, if an item worth 1.3 million never comes up, I think it is germane. It doesn't require a lot of legal knowledge for two businessmen to sit down and decide what they don't want to sell.

THE COURT: Haven't you brought out there was not any discussion about the lease?

MR. PRATT: Yes. I am trying to bring out it was his understanding that the lease was not part of it, quite apart from the fact there was no discussion.

MR. CANTOR: Your Honor, the only basis for the objection is that I don't think this man can testify as to his understanding of what was not involved unless there is a predicate laid that he knew what was not involved

actually existed.

THE COURT: You mean whether or not he knew at that time that such a lease had been signed?

MR. CANTOR: That is correct.

THE COURT: You have not developed that yet? The witness has identified the document, but I guess you haven't brought out whether he knew at the time of these negotiations in the end of '65 whether such a lease had been executed.

MR. CANTOR: That is my point, Judge.

MR. PRATT: I haven't brought that out. However, I think this: If the witness knew what was involved, by exclusion he knew what wasn't involved. I am sure the witness wasn't aware of many, many things, but he knew they were involved; but I will ask the question anyway.

THE COURT: The point you made is that it wasn't discussed at any time.

MR. PRATT: It wasn't discussed at any time and it wasn't his understanding that the lease was in any way involved.

THE COURT: I think that is relevant. Whether he knew about it later or not is something else.

Q When did you become aware Plaintiff's Exhibit 1, the lease, existed, and the amendments?

A Late in '64, early '65.

Q Then you were aware of the existence of this lease prior to the negotiations you entered into on behalf of Freuhauf Corporation to sell the assets of the Strick Division to the new Strick entity?

A Yes.

Q Just to get the record straight, was it your understanding that the lease was in no way involved with this negotiation and this contract to sell the assets of Strick division to the new entity?

A Yes.

Q Was the sale of the Strick assets consummated on January 11, 1966?

A Yes.

Q By the execution of the agreement which has been marked in evidence as Plaintiff's 4?

A Yes.

Q After January 11, 1966, did Freuhauf continue to receive all payments due it under the lease from Seatrain?

A Yes.

Q Did this continue throughout the remaining life of the lease?

A Yes.

Q After January 11, 1966, did the new Strick Corporation ever attempt to establish any claim to these rental payments?

A No.

Q Did Freuhauf Corporation consider these payments received from Seatrain as rental payments?

A Yes.

Q Going back to the January 11, 1966 agreement, were any equipment leases sold to the new Strick Corporation by Freuhauf under that agreement?

A Yes.

Q One or more?

A Several.

Q Can you tell us any of them?

A There were around $3 million worth of leased equipment, before depreciation, that was sold.

Q How was that transaction handled?

A They paid us --

Q When you say "they," try to identify them.

A The new Strick Corporation paid us the then book value of the equipment underlying those leases.

Q And you sold them the leases?

A They got the trailers and the leases went with them.

Q After such sales, did Freuhauf receive any more payment under those leases?

A No.

Q What type of leases were they?

A Conventional trailer leases.

Q Were they similar to Plaintiff's Exhibit 1, generally?

A Yes.

MR. CANTOR: I will object to the form.

THE COURT: This was the lease of equipment to third parties?

THE WITNESS: Yes.

MR. CANTOR: Judge, I would like some definition of the word "similar," because there will be a lot of issues here about accounting treatment and what was similar and not similar.

Q Were these leases which you have testified were actually sold to Strick Division, the new Strick entity, by Freuhauf, leases whereby containers, bogies, rolling stock of some sort, were leased by Freuhauf Corporation when they were made up to third parties?

A Yes.

Q Were there any equipment leases of the type I have just described and we have been talking about here

retained by Freuhauf Corporation in addition to Plaintiff's Exhibit 1?

A There were other leases similar to the Seatrain lease that we retained, yes.

Q Did the lessee continue to make payments to Freuhauf?

A Yes.

Q Under these leases?

A They did.

Q Did these leases eventually terminate?

A Yes.

Q What happened to the equipment?

A We got it back.

Q Was any claim ever made by Strick Corporation for the equipment?

A No, not to my knowledge.

Q Who returned the equipment to Freuhauf at the expiration of these leases?

A The various lessees.

Q Plaintiff's Exhibit 4 you described as a document, the agreement whereby the assets of the Strick Division were sold to the new Strick Corporation by Freuhauf.

I will refer you to page 14 of that document

and ask you to read subparagraph 6-B, subsection 1.

A "Seller shall deliver to buyer all proper instruments of transfer, including deeds to real estate, bills of sale for personal property, and assignments of contracts, leases, patents, patent applications, licenses and other assets sold hereunder, except that buyer may accept at the closing date as to all or any part of the foregoing one or more general assignments containing seller's assurance that it will promptly thereafter execute and deliver all such further instruments as buyer may reasonably request to confirm buyer's title to particular assets included in the sale and otherwise to carry out this agreement."

Q What is your understanding of that part of subsection 6-B(1)?

A That we were to deliver title to whatever they bought.

Q And is it also fair to say you should execute whatever instruments they reasonably request to evidence such title?

A Yes.

Q Were any instruments executed by Freuhauf Corporation pursuant to Section 6-B(1)?

MR. CANTOR: Your Honor, I will object to this.

The documents speak for themselves. There is a bill of sale annexed. This gentleman is not a lawyer and it is one thing to ask him for his understanding of the negotiations and what was discussed and so forth, which is the critical language, but to ask him whether an instrument was ever executed when we have a whole raft of instruments in evidence, I don't think is a proper question.

THE COURT: He is being asked, is he not, whether any instrument was ever executed so far as he knows, in compliance with 6-B(1)?

MR. PRATT: That is my question.

THE COURT: I think the question is proper.

Q Do you have that question?

A Yes, there is such a document, several documents.

Q I am going to hand you a document previously marked as Plaintiff's Exhibit 5 and ask you if you are familiar with that document.

A Yes, sir.

MR. PRATT: I offer it.

MR. CANTOR: No objection.

*** (Plaintiff's Exhibit 5 for identification received in evidence.)

Q Is that a document that was executed, to the

best of your understanding, pursuant to the January 11, 1966, agreement, paragraph 6, subsection B(1)?

A Yes.

THE COURT: It bears the same date, doesn't it?

MR. PRATT: Yes, your Honor. I just wanted to get it in and get it identified as to what it was.

Q I will ask you to turn to page 24 of the January 1966 agreement. I will ask you to read on the top of the page paragraph 14-A.

A "With respect to any assets sold hereunder which cannot be physically delivered to buyer because they are in the possession of third parties or otherwise, seller at buyer's option shall give irrevocable instructions to the party in possession thereof with copies to buyer that all right, title and interest in and to the same have been vested in buyer, and the same is to be held for buyer's exclusive use and benefit."

Q At any time, to your knowledge, did the buyer, Strick Corporation, the new Strick Corporation, ever request that any instruments be drawn up, executed, with reference to the residual value of the equipment leased by Freuhauf to Seatrain, and I refer to Plaintiff's Exhibit 1.

A No, they did not.

Q With respect both to section 6-B(1) and section 14-A, did any equipment payments, the lease itself, residual value, or anything else you can think if, ever come up from Strick Corporation as far as executing agreements or writing papers of any kind or doing anything, as far as you know?

MR. CANTOR: I will object to the form. If the question is, the original question, the request to execute a document transferring title, that is one question, but there was a whole series of correspondence which was marked at the depositions, and maybe Mr. Silverstein isn't familiar with it, but I think it is misleading to suggest there were no claims made back a number of years ago.

I would have no objection to the original question, to his knowledge was a specific request made to assign title.

THE COURT: I thought it was so limited, is it not?

MR. PRATT: It is, your Honor. What I am trying to do is to establish whether Strick acted under these provisions with relation to that lease.

Q Do you want to have the question read back, or do you understand it?

A I think the question is: Were we ever asked to deliver title under that clause?

Q Or do anything.

A The answer is no.

Q Was the matter ever discussed?

A At what point in time?

Q At any point in time.

A Yes, it eventually was.

Q Can you briefly describe the discussion, by whom, with whom, if you remember?

A Early in 1968 there started to be some agitation -- that was the time some of the units were wrecked.

Q I didn't get that last word.

A When some of the units were destroyed, there was a question who should be paying for it. That is the first time there was any discussion of residuals.

Q Let's go back a minute here.

Prior to that discussion which you just now referred to, was there any discussion?

A Not to my knowledge.

Q About residuals, the lease, payments, anything to do with the lease?

A No.

Q Is it your testimony that sometime in 1968 the matter was first discussed?

A Yes.

Q Who brought the matter up?

A I don't know that.

Q What was the nature of the discussion?

A It was a question as to who was entitled to the residuals.

Q Why don't you give a little narrative as to that, what did it involve?

A Seatrain, as I remember, wanted to modify the units and we were arguing they cannot modify the units, change them physically. We were concerned it would impair their value.

There was a long discussion at that time and I think our then treasurer -- I know our then treasurer wrote a letter discussing our claim to the residuals and whatever else was in there. The treasurer's name was Norm Ryan. I think it was in '68 that he wrote a long letter discussing the subject.

Q Did there come a time when two of these Flexi-Van trailers under Plaintiff's Exhibit 1 became wrecked?

A Yes.

Q I will show you a document marked Plaintiff's Exhibit 6, consisting of a one-page agreement and three other pieces of paper, and ask if you can identify it.

A Yes, sir.

MR. PRATT: I request it be received in evidence as Plaintiff's Exhibit 6.

MR. CANTOR: No objection.

(Plaintiff's Exhibit 6 for identification received in evidence.)

THE COURT: I have an extra copy somewhere, your Honor. I will provide the Court with the extra copy when I can locate it.

Q What were the circumstances surrounding this particular little set of documents?

MR. CANTOR: Objection, unless it is established that Mr. Silverstein has personal knowledge. I have been refraining with some of the others, but I think here that ought to be established.

Q Do you have personal knowledge of the circumstances surrounding this particular set of documents?

A They arose because two units were destroyed.

Q You personally know that? We have to lay a foundation for the fact you didn't hear it or something, that you know it from your own work in the Freuhauf

Corporation.

A It came out in the course.

Q Incidentally, on the other questions I have asked you, have you responded from your own knowledge as an officer of Freuhauf Corporation?

A Yes.

Q Of your own personal knowledge, to all my other questions?

A Yes.

Q Will you describe here what happened here --

MR. CANTOR: Your Honor, I didn't understand Mr. Silverstein to say he had personal knowledge from his dealings with Seatrain, as opposed to what someone in Freuhauf told him. If all he knows is what someone in Freuhauf told him, we ought to have that person here. If he had dealings with Seatrain about this, I would have no objection to the form of the question.

MR. PRATT: I don't think he saw the boxes being wrecked. He knows they were wrecked and we have here, what I am trying to establish, is Seatrain's recognition of ownership in Freuhauf of these two boxes.

MR. CANTOR: That is exactly my point, and that is why I object to this line. Our position would be there was no such recognition and I would object to the hearsay

testimony.

Q Can you please identify the signatures, if you will, on the bottom of this agreement?

A Clark Abbott signed for Freuhauf.

Q Do you recognize the signature of that person? Is it Weber?

A It looks like Weber.

MR. CANTOR: It was William Weber of Seatrain Corporation. We will stipulate to that.

Q This is an important document. I request you read it into the record.

THE COURT: Can't I read it myself?

MR. PRATT: Of course, your Honor.

(Pause)

THE COURT: What is that signature on behalf of Freuhauf?

THE WITNESS: A man by the name of Clark Abbott.

Q Why don't you read that into the record.

A "Agreement. This agreement made this 21st day of September 1972" --

THE COURT: We will take a ten-minute recess now. You don't have to read it to the Court. I just read it.

MR. PRATT: I would like it read into the record or the reporter can copy it.

("Agreement: This agreement made this 21st day of September, 1972, by and between Seatrain Lines, Inc. [hereinafter called Seatrain] and Freuhauf Division, Freuhauf Corporation [hereinafter called Freuhauf].

"In consideration of the sum of $2,952.74, receipt of which is hereby acknowledged, Freuhauf gives and Seatrain takes full and perfect legal and equitable ownership of the following equipment:

"2 Flexi-Van refrigerated containers with refrigeration units, serial numbers B9438 and FNB-9455;

"2 diesel motor generators, serial numbers 94781980 and 8E3884B.

"Freuhauf warranties and represents that it owns abovesaid equipment free and clear of any and all liens or claims.

"Freuhauf releases and discharges Seatrain from all covenants, obligations or promises affecting the abovesaid equipment [including but not limited to the payment of rent or purchase installments] which Seatrain has agreed to perform.")

(Recess)

BY MR. PRATT:

Q Mr. Silverstein, I show you a letter marked for identification Plaintiff's 7 and ask if you can identify that letter.

A Yes, sir.

MR. CANTOR: Judge, if this is being offered into evidence, which I assume it is, I would object on a number of grounds.

There was a separate transaction which this document is one of a series of letters that it relates to -- I guess I am objecting on relevance, and if your Honor wants to take it for whatever relevance it has, I would only note this is one letter of a series of correspondence.

THE COURT: You claim it is not relevant?

MR. PRATT: And we claim it is.

(Plaintiff's Exhibit 7 for identification received in evidence.)

Q This facsimile of a signature on the bottom of that letter is "Harry." Do you know who "Harry" refers to?

A Harry Shapiro.

Q Who was he?

A He was an officer -- an employee of Freuhauf Corporation until the divestiture of Strick working in the financial area; and the Strick people can more precisely

1 give his title. He then became an officer of Strick Finance,
2 to the best of my knowledge.
3 MR. CANTOR: We will stipulate, by the way,
4 he is an officer of Strick.
5 MR. PRATT: I just wanted him to identify it
6 for the Court.
7 Q Would you please tell the Court of your own
8 personal knowledge what the matter referred to by
9 Mr. Shapiro in his letter to Mr. Cowling is all about?
10 A In 1962 the Strick Division of Freuhauf
11 Corporation delivered some equipment under a lease to the
12 Milwaukee Railroad. There was some argument by the
13 Milwaukee Railroad that the equipment did not perform as
14 they thought it should. It was a question as to who was
15 liable. They wanted to get out of the lease. It was a
16 lease that was retained by Freuhauf, the same type of
17 lease precisely as the Seatrain lease, and the Milwaukee
18 Railroad wanted to get out of the lease.
19 There was a letter -- Cowling wrote a letter
20 to Mr. Katz complaining about the treatment he was
21 getting and --
22 Q Before you go any further --
23 MR. PRATT: Would you identify who Mr. Katz
24 was?
25

MR. CANTOR: He was the president of the Strick Division prior to the divestiture and he has a similar capacity -- he was a principal of Strick Corporation after the divestiture and still is to this day.

Q Would you continue.

A In any case, Milwaukee wanted to return these units to Strick and get out of any further obligation to Freuhauf, essentially is what they wanted to do, and this is a letter that Mr. Shapiro wrote stating presumably what was Strick's position.

THE COURT: What does this amount to then, apparently beyond some belief on the part of Milwaukee that Freuhauf had some residual interest?

Is that the point?

MR. PRATT: No.

THE COURT: What is the point?

MR. PRATT: The point is, in the leases retained by Freuhauf, Strick recognized that the equipment belonged to Freuhauf, and in this one, where Milwaukee was dissatisfied with the equipment --

THE COURT: This is one of those leases that had been retained by Freuhauf?

MR. PRATT: Right. They bucked the bag to Freuhauf.

I have no further questions of Mr. Silverstein.

CROSS-EXAMINATION

BY MR. CANTOR:

Q Mr. Silverstein, are you familiar with all the documentation in the Milwaukee Transport situation?

A Yes, sir.

Q Are you familiar with the fact that in the Milwaukee Transport situation, the lease involved there contained as part of the lease payments an option to purchase the equipment by Milwaukee Transport?

A I am not familiar with that one way or the other.

Q Do you know that in the Seatrain situation there was no option to purchase the equipment?

A Yes, I do know that.

Q Would it make a difference to you if it turned out in the Milwaukee Transport situation there was an option to purchase the equipment and that option was paid off as part of the lease payments?

A No.

Q That would make no difference to you?

A No.

Q In the Seatrain situation, it is clear, is it not, that at the end of the lease, had there not been a

divestuture, Seatrain would have had no rights to the equipment; is that correct?

A That is right.

Q And the equipment would have gone back to whom?

A The Strick Division of Freuhauf.

Q So that the Strick Division had that interest in the equipment, that the residual would have come back to it?

MR. PRATT: Objection. It calls for a legal conclusion of the witness and it is Freuhauf Corporation which is the person who had the interest in it. If he is going to use Strick Division, I want it clearly understood in the witness' mind and the Court's mind because my learned colleague, Mr. Cantor, has brought up a number of times the fact that Mr. Silverstein is not capable of making legal distinctions; that any attempt to carve out a separate entity of Strick Division from Freuhauf Corporation I will object to because I don't think it establishes anything out of the witness' mouth and it is not relevant at all.

MR. CANTOR: Judge, I will withdraw the question.

Q You did not know, however, that Milwaukee Transport, if it turns out to be the fact, had an option to purchase this equipment?

A I knew there was a residual. Whether they had

an option, I did not know.

Q Do you also know the manner in which the Milwaukee Transport situation was ultimately resolved?

A No, I can't say that I do.

Q Now, sir, maybe we can establish a few basics that would be helpful to the Court.

The Seatrain lease was a lease, correct?

A Yes, sir.

Q Lease equipment was in fact sold under Plaintiff's Exhibit 4, which is the purchase agreement; is that correct?

A Certain leased equipment was, yes.

Q Leased equipment was in fact a category of items, was it not, that was included in the definition "property, plant and equipment," is that correct?

A Yes.

Q And the Seatrain lease was in fact a lease, correct?

A Yes.

Q It was not a conditional sale?

A Yes, it was not a conditional sale.

Q Now, sir, if you would take a look -- do you have Plaintiff's 4?

A I have it here.

Q Take a look at paragraph 2-A, which begins on page 3, and just so this is clear to the Court, paragraph 2, the preamble reads, "The assets to be sold, assigned and transferred by seller to buyer at the closing date as defined in section 6-A hereof, shall consist of the following as then constituted:

"A, the assets specified by classes below in this Section 2-A."

If you turn to the next page, one of the assets is property, plants and equipment; is that correct?

A Yes.

Q And property, plant and equipment include leased trailers, is that correct?

A That is correct, yes.

Q If we continue on on page 4 at the bottom, included also in the property, plant and equipment was, as we flip over to page 5, "all movable equipment, wherever located, used in the operations of the Strick Division, whether or not expensed or charged off or for other reasons not given a carrying value on the comparative balance sheet."

A Yes.

Q Is that correct?

A Yes.

Q What was your understanding of the category "movable equipment not given a carrying value on the balance sheet"? What types of items did you understand to be included in those?

A Anything used by Strick in its operation. Specifically, any moving equipment that would move material within a plant.

Q Such as trucks?

A They used trailers to store records in that were off the books.

Q Under the Freuhauf method of accounting, is it not correct, sir, that the residual in equipment was not given a carrying value on the balance sheet?

A I am sorry.

Q To be more specific, in the situation of the Seatrain lease, there was no value given on a Freuhauf balance sheet to the residual in that equipment, is that correct?

A That is correct.

Q So whoever owned the equipment, that Division's balance sheet would not show that residual?

A It would show -- yes, it would not show the residual.

Q Going back to what I think may really be at the

heart of this dispute, and that is the accounting methods of the Freuhauf Corporation at that time, is it not correct, sir, that certain leases, such as the Seatrain lease, which were so-called full pay-out leases, were accounted for by Freuhauf as contracts rather than as leases?

A That is correct.

Q Is that correct?

A Yes, sir.

Q That was purely for accounting purposes, is that correct?

A That is correct.

Q So that vis-a-vis the third party in this case, Seatrain, it was still a lease, right?

A That is correct.

Q And vis-a-vis the third party, no title was passed to the third party?

A That is correct.

Q Within the internal workings of Freuhauf, it was treated as a contract, correct?

A Yes, sir.

Q When it was treated as a contract within the internal workings of Freuhauf, that meant it got different accounting treatment on the books of the Strick division than if it had been treated as a lease; is that correct?

A Yes, sir.

Q And one of the differences was that 100 percent of the lease payments were discounted with the Finance Company and purchased by the Finance Company, is that correct?

A Your wording may differ from mine. If this is critical, be very careful with your words.

Q Let's have your wording on that topic.

A The Strick Division was paid for this lease as if it were a contract. That is how I would word it.

Q So underlying --

A It was then accounted for by Strick as if it was a sale and not a lease.

Q So that there are leases that are not full pay-out leases, correct?

A Yes.

Q And as to those leases, what happens in effect is that the Finance Company would loan money to the Strick Division against the receipt of the rental payments and as the rental payments were received, there would be a pay-down of the loan back to the Finance Company?

MR. PRATT: I object to that.

MR. CANTOR: It is a question.

MR. PRATT: It is factually impossible for a

Finance Company to loan money to a bundle of assets within a corporation. We are talking about apples and oranges, and it is important. If he said the Freuhauf Corporation, that is the person --

MR. CANTOR: I will clear that up.

MR. PRATT: We are dealing in two languages here, and if we glide interchangeably it will present a different picture than if we stay with one particular language. Mr. Silverstein is talking the language of an accountant, you are talking the language of a lawyer, yet the terms mean something very different in accounting than they do in the law, and that is where this whole confusion business I think is.

I will ask for a clarification of these terms because they are not what they seem.

MR. CANTOR: Judge, I am flattered that I am talking the language of a lawyer, but let me see if I can clarify this.

Q There was a separate entity, was there not, known as the Freuhauf Finance Company?

A Correct.

Q That was a wholly-owned subsidiary of Freuhauf Corporation, correct?

A And still is.

Q It was not a division, it was a separate legal entity?

A Yes.

Q What I am saying is, in a non-full-pay-out situation, the lease which still remained on the books of the Division --

A The lease would stay on the books? Not the lease.

Q Tell us what would happen under the accounting treatment.

A The underlying equipment would stay on the books.

Q The underlying equipment would stay on the books of the Division, correct?

A Yes.

Q Against the expectations of rental payments, the finance subsidiary would loan money to the Division, correct?

A To the corporation, then to the Division.

Q So that there would be a payable owing by the Division to the Finance Company, correct?

A Yes.

Q In exchange for the loan?

MR. PRATT: I object to that. I think it is misleading the witness. The payable would be owned by

Freuhauf Corporation.

Q Did the Strick Division have a full set of books?

A Yes.

Q Would it have a payable on its set of books?

A Yes.

Q In a full payout situation, such as the Seatrain situation, I think you have told us previously that would be accounted for as a sale, is that correct?

A Yes.

Q So instead of a loan being made from the Finance Company to the Division, the rental payments would actually be purchased, is that correct, by the Finance Company?

A Yes. That would be correct.

Q So what would happen is that there would be an intercompany credit in which, to take your figure of $1,700,000 owing in rental payments, that would be removed entirely from the books of the Strick Division and it would be credited via the intercompany account for the discounted value of the full rental payments; is that correct?

A That is correct.

Q And that is what happened in this situation, is that correct?

A That is all correct, yes.

Q In fact, when the credit was given to the Division, the Strick Division, it never got any credit for the residual value of the equipment; is that correct?

A I would have to look at the documents to be sure exactly what the dollar amount is. I would like to see the documents to make sure what those amounts are.

Q Let's start with your prior testimony, sir.

Do you remember your deposition was taken some years ago in this action, and at the bottom of page 83, the top of 84, you were asked these questions, starting 83, line 8:

"Q When this piece of paper was converted from a lease into an installment contract, was there any additional consideration to Freuhauf from the Finance Company?

"A Yes.

"Q Is that the additional consideration that you think was passed through to the Strick Division?

"A Yes.

"Q That is the piece of paper you were going to look for to see if you could find anything reflecting that?

"A Yes.

"Q Is that the 20 percent?

"A Yes."

Just so it is clear for the Court -- I take it you gave those answers to those questions.

A Yes.

Q And the 20 percent that we are talking about is that when something was treated as a lease, the Finance Company could only loan 80 percent of the minimum sales value; is that correct?

A Yes.

Q They could not loan the full 100 percent as they could after it was converted, correct?

A They could loan a different amount on what was treated as a lease, as compared to what they could loan on those things that were considered for accounting purposes to be sale.

Q What was considered for accounting purposes to be a sale, the Finance Company could loan more on that?

A Yes.

Q And in turn borrow more on that from its outside lenders?

A I am not sure whether or not they could borrow more, but they could lend more.

Q Let's pick up with the questioning at line 20.

"Q Is there anything in addition to reflect the residual value?

"A Not to my knowledge.

"Q When I ask you for the piece of paper, I take it it would be on the same piece of paper, is that correct?

"A Yes. I would say if there was any dollar passage for the residual, it should have been on that same piece of paper. I would guess there was not."

Did you give those answers to those questions?

A I presume so.

Q Would your testimony be the same today, that you would guess no value was given for the residual?

A I repeat, it would be a guess, yes.

Q I take it, sir, it is your contention, is it not, that even though no value was given for the residual, the residual was assigned to the Freuhauf Finance Company back in 1964?

A Yes.

Q That is your position, correct?

THE COURT: Assigned to what company?

MR. CANTOR: The Freuhauf Finance Company, the wholly-owned subsidiary of Freuhauf Corporation.

A Yes.

Q I take it it is clear if the residual were not

assigned in 1964 to the Freuhauf Finance Company, then it would have been, by definition, one of the assets sold in 1966, would it not?

A I think that is a conclusion of law, isn't it, or is it?

Q I would like your understanding.

MR. PRATT: I object to that. He stated it is a conclusion of law, and it is.

MR. CANTOR: Is the objection sustained? I would like to get this man's understanding as opposed to the ultimate conclusion.

THE COURT: I think in view of the direct examination I will allow the question and give it such weight as it is entitled to.

Q My question is this, and let's back up so we have a consistent sequence.

It is your position that even though no credit was given for the residual value on the equipment that the residual value was assigned back in 1964 from the Division, from the Strick Division, to the Freuhauf Finance Company or Corporation, is that correct?

A Yes, sir.

Q And the Freuhauf Finance Company is a separate legal entity from the Strick Division, is that correct?

A Yes.

Q What I am asking is your understanding if the residual had not been assigned back in '64, would that residual have been covered by the sale agreement as you understand it?

A It would not. It was my understanding that Strick bought specific book assets and we argued about the value of all those assets ad nauseam.

Q So your understanding is that even if the residual had remained in the Division, it would not constitute either leased equipment or movable equipment, whether or not given a carrying value on the balance sheet?

A It would not have fitted my understanding of those terms or we wouldn't be here today.

Q It is your understanding, however, that the residual was assigned to the Finance Company in 1964?

A It is my understanding that the Finance Company purchased that lease as a contract and everything that went with it.

Q Do you have any knowledge as to who made the application in 1965 for the registration of the vehicles?

A Was 1965 the original application?

A The original was in '64, prior to the purported assignment. I am asking you about '65, after the purported

assignment to the Finance Company, who made the application for the registration on the vehicles?

A To my knowledge, there was no application. The Finance Company was not qualified to do business in Maine, which is where the vehicles were titled.

Q Somebody had to make an application?

A The Freuhauf Corporation.

Q Do you know what the application filed by Freuhauf Corporation said as to who the owner of the equipment was?

A Strick Division, Freuhauf Corporation.

Q The Strick Division of Freuhauf Corporation?

A Yes.

Q Even though your position is that in 1964 all right, title and interest to the vehicles had been assigned to Finance Company?

A Yes.

Q The next year the Freuhauf Corporation said the Strick Division still owned the equipment?

A Yes.

MR. PRATT: That is putting words in the witness' mouth.

The witness testified that the licensing in Maine was due by Strick Division of Freuhauf Corporation.

Yet there is an attempt here to build up a record about Strick Division without the all important words "Freuhauf Corporation," and I object to his continually attempting to whisk it by a gentleman not a lawyer.

THE COURT: You are simply asking how these were registered, are you not?

MR. CANTOR: That is correct.

Q Incidentally, Mr. Silverstein, do you know how the bogies were registered in 1966 after the purchase agreement was consummated?

A No, I do not.

MR. CANTOR: I would like to ask the Court if I could mark as Defendants' Exhibits -- part of the problem is certain documents were premarked from the depositions. If I could mark these XX and XX-1 through XX-4, that wouldn't conflict with any other marking.

(Defendants' Exhibits XX and XX-1 through XX-4 marked for identification.)

Q Mr. Silverstein, before we get to these documents, let me ask you whether you know if the Freuhauf Corporation or Freuhauf Finance Company made any effort after the purchase agreement to register these bogies in its name.

A Not to my knowledge. They were registered in

the name of Freuhauf Corporation, Strick Division, Freuhauf Corporation.

Q That is prior, is that correct?

A Yes.

Q Prior to the purchase agreement?

A Yes.

Q Let me show you Defendant's Exhibit XX and let me ask you whether you can just by looking at this document identify it and tell us what it is.

A It is a Maine registration covering 100 bogies dated apparently 1964.

Q Is that, sir, to your knowledge, the equipment, the bogies that were involved in this lease?

A I would have to check the serial numbers.

Q Let me ask you to assume it for the moment and I will represent to the Court that it is the same equipment --

MR. CANTOR: I will offer that in evidence.

MR. PRATT: I have no objection.

(Defendants' Exhibit XX for identification received in evidence.)

THE COURT: Apparently you register bogies in a wholesale fashion, rather than getting a license for each one.

MR. CANTOR: That is correct, although plates

1 were put on each bogie, but one document was filed for
2 the whole hundred.
3 Q Mr. Silverstein, this is the registration form
4 for 1964, is that correct?
5 A Yes, sir.
6 Q That would have been -- well, there is no
7 month specified, but let me just ask you to assume for
8 the moment that this would have been prior to the purported
9 assignment of the residual to the Finance Company that the
10 registration was filed.
11 Are you with me?
12 A Yes.
13 Q At that time, the equipment was registered as
14 Strick Division, Freuhauf Corporation, owner, is that
15 correct?
16 A Yes.
17 Q And that would have been before, and I am asking
18 you just to assume this, the purported assignment?
19 A Yes.
20 Q The reason for the assumption, and let me make
21 this clear, whatever happened with respect to the
22 conversion for accounting purposes from a lease to a
23 contract happened very late in the year 1964?
24 A That is correct.
25

Q Now, sir, take a look at Defendants' Exhibit XX-1 for identification and let me ask if you can identify this document.

Can you identify it for us?

A Yes. It is a reregistration of the same bogies for 1965.

MR. CANTOR: I would offer that in evidence as well.

MR. PRATT: No objection.

(Defendants' Exhibit XX-1 for identification received in evidence.)

THE COURT: It is in the same name as in '64?

MR. CANTOR: Yes.

Q Mr. Silverstein, my question is, in 1965, whatever had happened for accounting purposes with respect to the Seatrain lease had already happened, is that correct?

A Yes.

Q So that if in fact all right, title and interest in the equipment, as well as just in the lease payments had been assigned to Freuhauf Finance Company, that would have already happened by 1965, is that correct?

A Yes.

Q Would you read to the Court who the Freuhauf

Corporation said was the owner of the equipment in 1965?

A Strick Division, Freuhauf Corporation.

Q Let me show you XX-2 and ask you if you can identify that for us.

A It is a 1966 State of Maine registration for the same bogies.

MR. CANTOR: I would offer that in evidence, your Honor.

MR. PRATT: No objection at this time.

(Defendants' Exhibit XX-2 for identification received in evidence.)

Q Sir, who is listed as the owner of the bogies on that registration?

A Strick Trailer Corporation.

Q That was the company that purchased the assets from Freuhauf?

A That is right.

Q And its name was later changed, you know this, to the Strick Corporation; is that correct?

A I cannot say that I know that.

Q And I think you told us earlier to your knowledge Freuhauf Corporation never filed such a registration with respect to these bogies?

A I think that is correct.

Q Can you tell us what XX-3 is, sir?

MR. PRATT: I object. Didn't he just testify or didn't you just introduce in evidence something to show that Freuhauf Corporation --

MR. CANTOR: I am sorry.

Q Subsequent to the purchase agreement on January 11, 1966, Freuhauf Corporation never did file such a document as XX-2, to your knowledge?

A Yes, that is correct.

Q Can you tell us what XX-3 is?

A I can say what it appears to be.

Q Tell us what you think it is and I will offer it and the Court can rule on it.

A It appears to be a check and a request in the name of Strick Corporation to the Secretary of State to buy some license plates.

Q To reregister 54 of these bogies for the year 1967?

A There is no way to tell whether they are the same bogies or not. There is no serial numbers.

THE COURT: You had nothing to do with this document?

MR. CANTOR: I will save it for our witness, Judge.

Q I believe you told us previously in your testimony that you thought, but you were not sure, that no credit was given to the Strick Division for the residual value of the equipment; is that correct?

A Yes.

Q If in fact such credit was given, that should be reflected in the documents of the Freuhauf Corporation, is that correct?

A Yes.

Q Do you know of any such documents reflecting any credit for the résidual?

A I would have to make an analysis of the numbers that underlie the credit ultimately given at the end of '65.

Q Sir, can I ask you ....

A Excuse me, at the end of '64.

Q Can I ask you over the lunch hour to make whatever analysis you want on whatever documents we have, and I will ask you the same question after lunch and maybe you can answer it with more certainty, and that is: Was the Strick Division ever given any credit for the residual value of the equipment at the time that the lease payments were purchased by the Finance Company?

I am making that request, and with your attorney's permission, take a look at the documents over

the lunch hour, OK?

MR. PRATT: I know it is not going to stop this line of questioning, but I will object to the whole line of questioning on the following grounds:

One, it hasn't been shown it has anything to do with the sale of an asset. It is irrelevant, immaterial, not probative as to whether or not certain assets were sold by Freuhauf Corporation to a new company called Strick Corporation. It is simply building castles in the air about some intramural accounting problem, which is a building of an assumption on an assumption, and although it was never negotiated, something ended up in the hands of Strick Corporation.

The question is simple: Did they sell it or didn't they?

THE COURT: I will take it for what it is worth.

MR. CANTOR: Just to respond so you understand where I am going: It has always been my understanding of the plaintiff's contention here that the reason that the assets was not sold to the new company is because it had been previously assigned to the wholly-owned subsidiary, namely, Freuhauf Finance Company, and what I am asking, and Mr. Silverstein says it is his understanding, that in

fact the residual was assigned despite the fact the registrations indicate otherwise and so on, and I am asking if it was assigned, was anything paid for that and Mr. Silverstein has told us he thinks not, but he would like to check the documents to be sure, and I have asked him to check the documents over the lunch hour.

Q Incidentally, Mr. Silverstein, was any notice--let me withdraw that.

There were questions in your deposition concerning the AICPA and its allowing the Fruehauf Company or any company, for that matter, to treat full payout leases as sales for accounting purposes?

A Yes.

Q Do you know when that AICPA policy went into effect?

A September 1964

Q September of 1964.

Do you have the guidelines of the AICPA here?

A Yes.

Q Perhaps you could point out to me over the break where that was permitted and I may have some questions about that as well.

It is, sir, the fact, is it not, that the basic agreement between Strick Division of Freuhauf Corporation, on

the one hand, and Seatrain, on the other, was never modified in any respect because of this internal accounting conversion, is that correct?

A That is correct, yes.

Q So that no new agreement was entered into with Seatrain telling it that this is now a conditional sale or installment contract?

A It never became a conditional sale or installment contract.

Q It was always a lease and nothing other than a lease?

A Yes, sir.

Q And it is only for accounting purposes that Fruehauf treated that lease as a sale, correct?

A Yes, sir.

Q Previously I think your attorney was asking you questions about the lease payments and it is the fact, and I think we may have stipulated on the record that in fact Seatrain made all the lease payments to Fruehauf, is that correct?

A Yes.

Q Both before and after the purchase agreement?

A Correct.

Q If I am not mistaken, they made the lease

payments directly or indirectly to the Fruehauf Finance Company; do you know that for a fact?

A I know it specifically how they made it. The Fruehauf Corporation remitted them to Fruehauf Finance.

Q And the reason for that is, because the Fruehauf Finance Company had purchased those rental payments from the Strick Division back in 1964, correct?

A They purchased it from the Strick Division of Fruehauf Corporation.

Q And credit was given on the Strick Division books for that purchase, correct?

A Credit was given to the Strick Division at the end of 1964 when the Finance Company purchased the lease as a contract, if I can use those terms. It was purchased as a contract at the end of 1964.

Q At the time the credit was given on the intercmpany books, what happened in substance is that the discounted value of the lease payments was credited, in cash, on the books of the Strick Division, is that correct?

A You do not credit it in cash.

Q An entry was made showing the value on the Strick Division books?

A The value of the contract-- Strick was given credit for the value of the contract and that is the point

that I have to make sure of: how that number was arrived at.

Q Leaving aside the question of value for the residual, it is clear that the value of the lease payments was given, the discounted value, of the lease payments was credited to the Strick Division account, is that correct?

A As a minimum, yes.

Q So when we say that after 1966 the payments went to Fruehauf and Strick never made any claim for those payments, Strick had already gotten the benefit of those payments, had it not, by that cash transfer back in 1964?

A It was not a cash transfer but the Strick Division of Fruehauf Corporation had received full credit for the cash value of the lease rental payments and perhaps the residual.

Q Your guess is not the residual?

A Hence I use the word "perhaps."

Q Your guess is not the residual, is that correct?

A Yes.

Q Let me ask you to assume for a moment that instead of the Fruehauf Finance Corporation, the lease here, the rental payments had been sold to the XYZ Finance Corporation; it was not part of Strick, just the XYZ Finance Corporation; the discounted lease rental

payments were sold and then there was a divestiture in 1966. I am just asking you to assume that.

Who would Seatrain have made the rental payments to?

A I got lost in the dialogue.

MR. PRATT: I object because I don't see it and I don't understand how something that speculative is germane to this whole thing.

THE COURT: I will sustain that.

MR. CANTOR: Judge, let me try it again.

THE COURT: This is really an argument you are having with the witness so far as enlightening the Court is concerned.

I will sustain the objection.

MR. CANTOR: OK.

Q The cash credit that the Strick Division got in 1964 when it sold the discounted value of the rental payments to the Finance Company was in fact a credit that the Strick Division used in the operation of its business in 1965 and so on; is that correct?

A I would not use those words.

Q Tell methe words you would use.

A You don't use credit. That is an intercompany accounting entry. That does not give rise to something you

would use in the normal course of business.

Q All I am getting at, sir,is: the discounted value of these payments which were purchased by the Finance Company and sold by the Strick Division gave rise to a benefit in the Strick Division which constituted an asset of that division?

MR. PRATT: I will object to that. He is arguing with the witness. There are conclusions of law here.

If he wants to ask the witness what he understands happened, the witness can tell him.

Q What benefit, if any, did the Strick Division get from the sale of the proceeds of these rental payments?

A Effectively the leased trailers were removed from the leased equipment account and Strick then entered on its books a sale transaction covering an amount which is probably, to use your phrase or mine, the discounted value of the rental payments and may or may not have included something for the residual, and that amount was then put on the Strick books as a sale.

The Finance Company purchased the underlying document as a contract and gave Strick, released from Strick's books the receivable that arose from the booking of the transaction, as a sale.

Now, the rest of your words, I cannot follow, and

I don't mean to be unkind.

Q I understand. There may be a deficiency in the question.

If a sale is made to an outside entity, cash is received back in, hopefully?

A OK.

Q If the sale is made to the Finance Company, the wholly-owned subsidiary, what benefit is there to the Strick Division? The Strick Division has to continue to run, it has to pay its employees, buy equipment. What benefit does it get as a result of that sale?

A There are a lot of transactions that flow between a parent company and its operating division and obviously we have to fund in effect the Strick Division as we would any other division, and all the transaction between the Finance Company and the Strick Division of Fruehauf Corporation does, is that it removes from the Strick Division the receivable and it gets credit in its inter-company account.

It doesn't get any money. It gets money through other vehicles.

Q The credit, does the credit entitle it to money from the parent? How are the bills paid? You can't keep selling paper to the Finance Company and get credits? You

would go out of business unless you could use those credits.

A That would result in a credit to the intercompany account. If they needed cash, they would say they needed X hundreds of thousands or millions of dollars; we would then give them money-- excuse me, the other one would have resulted in a debit to the intercompany account. The receipt by Strick on their books would be a debit to cash and a credit to the intercompany account.

The sale of the underlying document, or let's just get out of this transaction and say any installment contract, would give rise to a credit to the receivable account and a debit to the intercompany account, but the two are not particularly tied together. They may need more money, less money. It does not have any -- the transfer of the installment receivable does not automatically give Strick any cash. It gives the parent company cash.

Q It gives the parent company cash and it gives the Strick Division an entry on its books reflecting the transaction?

A Yes, I would certainly agree with that.

Q If in fact, just one hypothetical, if in fact the paper were sold to an outside Finance Company rather than a corporation wholly owned by Fruehauf, then in fact

cash would be received by the Division, is that correct?

MR. PRATT: I object to that, your Honor, because I don't think the witness is capable of answering it.

I don't think it would be given to the Strick Division, it would have to be going to the Fruehauf Corporation.

If he is talking about a contract of sale between Strick Division of Fruehauf Corporation and some mythical finance company and he wants to go into the recipient of cash proceeds and the assignment of the lease and all those contractual documents, in a hypothetical argument, I think he really has to get down and define his terms and not use generic language which might be answered in a way that the witness would not intend to answer and I again note my objection to this whole line of questioning.

MR. CANTOR: As to the objection to the whole line, I am really trying to find out what the claim is here.

THE COURT: In any event, Strick Division got what amounted to cash, isn't that what you are trying to bring out?

MR. CANTOR: Yes.

Q And it is for that reason, is it not, that the

rental payments then went to the Fruehauf Finance Company and not to the Strick Division; is that correct, the reason being that the rental payments were sold to the Finance Company in 1964?

A Yes, that I agree with.

Q And that is different from a non-full payout situation. In a non-full payout situation, the rental payments actually go to the Division?

A That is correct.

Q So that in the non full payout situation after the purchase agreement in 1966, the rental payments continued to go, hopefully, to the new corporation formed as Strick Trailer Company?

A That is correct.

Q But that is because and only because those rental payments had not been sold to the Finance Company, is that correct?

A Yes, that is correct also.

Q Whether the rental payments were or were not sold to the Finance Company, in and of itself, has no probative value with respect to who owned the equipment, is that correct?

A Are you asking me as an accountant or as a lawyer?

Q As an accountant.

A I don't think I can respond to that.

Q Let's back up.

Do you remember there were some questions in your deposition about the trial balances and about taking the original lease transaction off the balance sheet of the Division and about putting on instead a sale to the Finance Company; do you remember that?

A Yes.

Q Do you remember that we established, I thought, in your deposition, but I can find the place, that those accounting procedures had nothing to do with who had title to the equipment, they were no proof of who had title to the equipment, is that correct?

A I am not sure-- I would say in my opinion they do not.

Q Do you know, sir, of any documents that purport to give title to the equipment to the Finance Company back in 1964 at the time that you claim it was transferred?

A No, I do not.

MR. CANTOR: Judge, if we can take a break for lunch, and my next line of inquiry, which will be my last line, will be directed around Mr. Silverstein's study of these documents.

He has told us he would be willing to take a look through the documents and that is all I have for him.

THE COURT: If we recess now until 20 minutes of two, will that give you enough time?

MR. CANTOR: It will me, Judge, if it does Mr. Silverstein.

THE WITNESS: Yes.

THE COURT: We will recess now until 1:40.

(Luncheon recess)

AFTERNOON SESSION

1:40 p.m.

A D O L P H T. S I L V E R S T E I N,

resumed:

CROSS-EXAMINATION (continued)

BY MR. CANTOR:

Q Mr. Silverstein, did you find the relevant documents to enable you to check whether any credit had been given to the Strick Division with respect to the residual on this lease?

A Yes, I did.

Q Can you tell us now what your testimony is, sir?

A The final -- excuse me. The amount credited was the 95 remaining payments with the interest computed?

Q Putting it in nonaccounting language, no credit was given for the residual, is that correct?

A Yes.

Q Just a few more questions and I will be through.

The Fruehauf Finance Company, we have established, is a separate corporation, correct?

A Yes.

Q And it is wholly owned by Fruehauf Corporation?

A Yes, it is.

Q It is not an operating company, is that correct?

A What does that mean?

Q It does not manufacture trailers, it is a finance company?

A Yes, it is a finance company.

Q It does not deal with the business of manufacturing or selling trailers?

A Yes, it does not.

Q And I think you told us earlier that had there been no divestiture here, the equipment at issue would have gone back to the Strick Division of Fruehauf Corporation, correct?

A Yes, I think that is right.

Q Sir, under the purchase agreement, if you remember, with respect to all leased equipment, including this leased equipment, the Seatrain equipment, who had the obligation to do any repair or warranty work on the equipment?

A Strick had the obligation to do the warranty work on all the equipment whether it was leased, sold, or anything. They had the total liability to do any warranty work on this Strick equipment.

Q So that as you used the word Strick equipment

there, you are referring to this equipment as well?

A Any equipment manufactured by Strick prior to the divestiture, the responsibility for doing warranty work was transferred to Strick. They were given a dollar allowance to the new Strick Corporation, they were given a dollar allowance to cover the anticipated cost.

THE COURT: Dollar amount to cover what?

THE WITNESS: The cost of performing the warranty.

MR. CANTOR: That is all.

REDIRECT EXAMINATION

BY MR. PRATT:

Q I refer to the January 11, 1966 agreement between Fruehauf and the new Strick Corporation and ask you to turn to page 4 of it.

The last four lines of that page, the first seven or eight lines of the next page 5, deal with property to be transferred to Strick, is that correct?

A Yes.

Q Did you have a discussion with anyone representing the new Strick Corporation regarding the language of that particular part of the contract?

A Yes.

Q Who did you have the discussion with?

A I had several discussions with Marty Bachman.

Q Just narrate for the Court the substance of those discussions.

MR. CANTOR: Are we talking about prior to the execution of the agreement?

MR. PRATT: Yes.

A This clause was inserted in a draft of the sale agreement and I asked Marty specifically what they were driving at, almost that colloquially, and Marty said "There are a lot of assets that are not on the books, fully depreciated assets still in use by Strick that had been removed from the books when they became fully depreciated. In addition, we have a policy on a lot of small equipment to put them on the books without specific identification and amortize them over a two-year period. At the end of two years, the cost is written off. There is nothing left but they are still-- nobody knows in fact whether they are in use in the plant or not in use in the plant."

And it was in the context of that that this paragraph was explained to me, because it struck me as a very unusual paragraph to have in an agreement to purchase assets.

Q Did he define the words used in the business?

A No, he did not.

Q Did you consider in your own mind that this included residual equipment that was leased by Fruehauf Corporation-Strick Division?

A No, I did not.

Q Did he try to insist that this be included under that provision?

A It was never talked about. Residuals were never discussed.

Q You testified on cross-examination about the fact that there were no residual value carried on the books of the Strick Division of Fruehauf Corporation in cases where a lease had been transformed for intramural accounting purposes into a contract of sale by Fruehauf Finance Corporation, is that correct?

A That is not exactly the way I would say it.

Q Say it how you would say it.

A I would say there was no residual carried on the books of the Strick Division of Fruehauf Corporation in respect of any leases that were treated for accounting purposes as contracts.

Q Did any leases that were treated for accounting purposes as contracts, were any of these leases sold to Strick Division pursuant to the January 11, 1966 agreement?

MR. CANTOR: Judge, for the same reason, I will

object. I will take his understanding.

MR. PRATT: I will amend that question.

Q Was it your understanding that any leases which had been considered to be for intramural accounting purposes, contracts of sale, were any of these leases sold according to your understanding, to Strick Division?

A According to my understanding, they were not sold as a part of this agreement.

Q Were any leases where the form of document was strictly a lease sold to Strick Corporation on this January 11, 1966 agreement?

A The non-full payout leases entered into by Strick were sold to Strick.

Q In the non-full payout leases, were trailer bodies and other equipment carried on the books of Strick Division as assets?

A Yes.

Q Were these assets bargained for and paid for by Strick Division?

A Yes.

Q In other words, they were in the book value?

A They were a component of the book value, yes, sir.

Q If a finance company -- we are going into a

hypothetical situation.

If a finance company had paid for -- pre January 11, 1966-- had paid for a residual, what would have been the impact on the assets purchased and the price?

THE COURT: Let me hear that again.

Q If the finance company had bought the contract but specifically recited and paid for a residual value, would there have been any impact on the assets of the Strick Division?

A No, there would not. Strick would have gotten an additional amount credited to the intercompany account and presumably that ultimately would have ended up with in the form of cash and they didn't acquire the cash, so presumably had they been given credit for the residual by the finance company when the accounting treatment was changed, it would not have affected the assets acquired by Strick or the price given for them.

Q If in any way, shape or form, a trailer showed up on the books of Strick as an asset, would you have bargained for it as a representative of Fruehauf and tried to get paid for it?

MR. CANTOR: I will object. That is speculative. It isn't hypothetical.

THE COURT: I sustain the objection.

Q Did you bargain for and negotiate all assets that were booked on the Strick Division books?

A Yes, we did.

Q No matter what they were?

A Exclusive of cash.

Q The sale did not include cash?

A Yes.

RECROSS-EXAMINATION

BY MR. CANTOR:

Q Just so we understand this. It is clear in addition to assets booked, that were shown on the books, other assets were purchased by the Strick Division; what became the Strick Trailer Company?

A Yes.

Q Among those were patents?

A Yes.

Q Goodwill to a certain extent?

A Yes, sir.

Q And various items that are described in that language that Mr. Pratt just read to you, whatever that language means; that there were items not given a carrying value that were purchased?

A Yes.

Q So the mere fact that the residual was not given

a carrying value does not mean in and of itself it was not purchased, correct? You are not suggesting that, are you?

A I would word it the other way around. If it had been given a value, I would have said it would have been purchased but I am not qualified to say whether it passes under that language. That is the whole point of the argument.

Q The only point I was trying to establish is, there were items and in fact $17 million was paid over and above book value for items that have no carrying value on the balance sheet, is that correct?

A I would say the business is what gave rise to the $17 million, but that is speculative,too. There were certainly items not on the balance sheet that were included.

Q Were you familiar during the negotiations-- let me withdraw that and ask a preliminary question.

Were you present at all for the negotiations?

A No, sir.

Q You have already told us you were not present when the handshake deal was made between Mr. Grace and Mr. Katz?

A That is true.

Q Were you present at all the other negotiations?

A I have no way of knowing it. I would guess I was not but I can't say that I know that.

Q Were you aware, during the negotiations that you were present at, of the proposed settlement language with the FTC for what would have to be divested? Were you aware? Yes or no?

A No.

MR. CANTOR: Nothing further.

MR. PRATT: No further questions.

THE COURT: At the time of this January 11, 1966 agreement, where was this equipment?

THE WITNESS: It was in the hands of a lessee which is Seatrain Lines.

(Witness excused)

MR. PRATT: Your Honor, I would like to call Mr. Ernest L. Rushmer.

I would also like to discuss very briefly with the Court and with my colleagues' consent when we think we will finish. I feel I am going to finish with Mr. Rushmer this afternoon. We don't have too much. I only have one additional witness which is an expert witness and I don't think that will take too long either.

I don't know how long your Honor wants to sit.

The expert witness lives not too far out of town but I am sure my side--

THE COURT: I thought I would sit until 4:30 today and we will start a little bit earlier tomorrow morning and sit later if need be.

MR. PRATT: If we can't get him down here, logistically trains being what they are, if we could not just get him on the first thing tomorrow morning, I don't have that much to put in.

THE COURT: We will do that tomorrow morning at 9:30.

MR. PRATT: That is fine.

MR. CANTOR: I certainly have no objection.

E R N E S T L. R U S H M E R, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PRATT:

Q Mr. Rushmer, tell the Court something about your education and your business background, legal background.

A Yes.

I graduated from the University Law School in Ann Arbor in 1935. I joined Fruehauf Corporation in 1954

as general attorney, later became also secretary-general counsel, and my last year or so I was senior vice president.

I retired in 1973.

Q Mr. Rushmer, did you act in any capacity for Fruehauf Corporation when they first acquired the assets of the Strick Company?

A Yes. I was a principal lawyer on behalf of Fruehauf at that time.

Q And you are familiar with the Strick Corporation story?

A Yes.

Q Did you not represent the Fruehauf Corporation in connection with the case before the Federal Trade Commission for divestiture?

A Yes, I tried a good deal of that case.

Q Are you familiar with Plaintiff's Exhibit 4 which is an agreement between Fruehauf Corporation and Strick?

A Strick Trailer Corporation dated January 11, 1966?

Q Yes.

A Yes, I am familiar with that.

Q Did you take part in the postglobal negotiations?

Excuse me. This morning we had testimony from Mr. Silverstein that there were two basic negotiations, one being between Mr. Grace and Mr. Katz in which an agreement in principle was arrived at, and a second more detailed negotiation between people representing Fruehauf Corporation and people representing Strick Corporation, out of which came the agreement.

Were you involved in either one of these negotiations?

A I have no knowledge of any handshake, so-called handshake agreement, between Mr. Katz and Mr. Grace. There may have been one but I am unaware of it.

Q Did you represent Fruehauf Corporation in connection with the preparation of that contract, Plaintiff's Exhibit 4?

A Yes, I did.

Q Incidentally, did anyone in particular draft that contract?

A Yes.

Q Who would that be?

A The man's name is Blair Smith, since deceased. He was a member of the Schnader Segal firm in Philadelphia. As a matter of fact, he and I worked together on the original acquisition of the Strick assets when we first

acquired the Strick Company.

I also employed him as our local counsel to handle Fruehauf matters during the time that Fruehauf operated the Strick Division.

Q How heavily were you engaged in the drafting, the legal work, whatever, that led up to this January 11, 1966 agreement?

A I think I was completely aware of all the negotiations. I think I probably attended all of the meetings between engineers and accountants and things of that sort, but in the sense we were trying to arrive at an appropriate document; I think I was present at all of those meetings.

Q Are you familiar with Plaintiff's Exhibit 1 being a lease agreement between Seatrain Lines and Fruehauf Corporation?

A I have seen a copy of it, yes.

Q Are you familiar with the terms of that lease at all?

A Generally, yes.

Q In your negotiations with the Strick Trailer Corporation, the new entity, did there come at any time a consideration of that lease as an asset to be sold to Strick?

A No, the question never arose.

Q In your opinion as an attorney, was the lease in fact sold to Strick pursuant to that January 11, 1966 agreement?

MR. CANTOR: I will object to his opinion in this, Judge. It may just be semantics. I would have no objection to parol evidence as to his understanding of the agreement.

I don't think he is really testifying as an expert with respect to it. He is just testifying as a participant.

THE COURT: I think that is what you meant, did you not?

MR. PRATT: Yes.

Q What was your understanding with regard to whether or not the lease, Plaintiff's Exhibit 1, was sold to Strick under the terms of the January 11, 1966 agreement?

A At the time we were drafting this agreement which Blair Smith had sent on to me for consideration of how do we divest the assets to the new Strick Corporation, our problem was to describe as simply as we could the assets being sold.

I am certain in my own mind in the preparation

of these documents, we didn't consider specifically the Seatrain lease as such. We tried to talk about categories of assets that would be transferred and sold to the new Strick Corporation.

Q What were these categories?

A The document describes plant and equipment. When you are selling a business, you describe plant and equpment first. It wasn't a sale of a business as such. It was a sale of productive assets, primarily.

Q I didn't get that word.

A Productive assets. Plants.

There was a great concern about patent rights. It was a significant thing to our friends at Strick how we dealt with patent rights, although it is pretty well spelled out in this agreement.

The reliance on recorded assets per balance sheets was a real accounting problem and Mr. Silverstein was responsible for that, and we tried to bring into the agreement recognition of that method of describing assets that he saw.

Q When you say recorded assets on Strick balance sheets, do you mean items that had a book value or were booked on the books of Strick within the Fruehauf Corporation such as plant and equipment or machinery, or whatever?

A Yes. We used an accountant's approach to try to decide what assets were going to be sold, then value them, and we would wind up with an agreement on that method.

Q Were some leases sold that had been entered into by Fruehauf Corporation-Strick Division with other lessees?

A You mean leases of trailers that had been manufactured by our Strick Division, were they covered?

Q Were any of them covered?

A As far as I know.

We were trying to describe in this agreement, and it speaks for itself, we were trying to describe the assets sold and among those assets were not the sales documents of equipment that had been sold in the marketplace. That isn't what we were selling.

Q So you were concentrating, if I can try to encapsulate it, on the business as a whole?

A Yes, the assets relating to the production of trailers by the Strick Division.

Q Are you familiar with an entity called Fruehauf Finance Company?

A Yes, sir.

Q Is that a wholly owned subsidiary of Fruehauf Corporation?

A Yes.

Q Did that Finance Company for intramural accounting purposes take certain leases and purchase them as "contracts of sale"?

A Yes.

Q Are you familiar with a document called Plaintiff's Exhibit 8 for identification. I ask you if you are familiar with it.

A Yes. That is a standard form of assignment prepared by our law department for use by the Finance Company.

MR. PRATT: I offer that.

MR. CANTOR: If I am being asked whether I have an objection on this, I do in part.

As I understand this document, this is the document whereby Fruehauf Finance in 1972 purports to assign this equipment back to Fruehauf Corporation and this document became the predicate for Fruehauf Corporation suing Strick and Seatrain.

I guess I have no objection to it coming in as long as it is understood we don't concede that the Finance Company had anything to assign in the first place.

If this is just to show what they purported to do, that is fine.

THE COURT: That is Plaintiff's Exhibit 8?

MR. PRATT: Yes.

xx (Plaintiff's Exhibit 8 received in evidence)

Q I would also like you to take a look at another document which I am going to request be marked Plaintiff's Exhibit 9 for identification.

xx (Plaintiff's Exhibit 9 marked for identification)

Q And I ask you whether or not you are familiar with that document.

A It is a rather prolix document. I am familiar with it. I think I am the drafter of it. My initials appear in the corner with the signature, so if you want me to go through it and refresh my recollection what it says ---

Q I will let it speak for itself.

Do you have any objection?

MR. CANTOR: My position would be this: I have no objection to the document which is actually a series of documents going into evidence for what it purports to do.

The defendants' position is that it does not do what it purports to do and in any event, they had no notice of it and it is not binding on them.

Without any concession that the defendants had

any knowledge of it, I have seen the document and I have no reason to question its authenticity.

xx (Plaintiff's Exhibit 9 received in evidence)

Q Mr. Rushmer, just one more question.

THE COURT: This is a letter from the Fruehauf Corporation to the Fruehauf Finance Company, dated December 1, 1964.

MR. PRATT: Yes, your Honor. It is really a letter agreement by which Fruehauf Finance Corporation sold leases to Fruehauf -- Fruehauf Corporation sold leases to Fruehauf Finance Corporation which we had a lot of testimony about this morning.

That is the underlying document.

MR. CANTOR: I would object to the characterization of what was sold. Our position is that lease rental payments at the most were sold.

THE COURT: Yes.

Q I want to get back to one question, Mr. Rushmer.

The agreement of January 11, 1966, is it your understanding of that agreement that the residual equipment or however you want to characterize the equipment that would ordinarily come back to Fruehauf from Seatrain at the end of the lease, namely, Plaintiff's 1, what is your understanding as to whether or not that residual was sold to Strick

Trailer Corporation by that January 11, 1966 agreement?

A You are talking about the property that was subject to the Seatrain lease specifically?

Q Yes.

A No, in no way do I believe that this document transfers any right,title,and interest in that equipment to the new Strick Corporation.

Q Would you care to tell us why?

A As I say, this document was an overall document prepared by Blair Smith, submitted by him to the Federal Trade Commission for approval after it was completed.

It tried to describe what was being sold. It has been pointed out here in this courtroom and to me before I came here, that one of the bases of the defendant's claim to any interest in this property lies in that paragraph on page 4.

My understanding is similar to Mr. Silverstein's understanding--that I have always thought and so advised my client when the matter was brought up to me later on as to whether or not this lawsuit should be brought, that these words talk about moveable equipment wherever located and used in the operations of the Strick Division, headed by descriptions of tools, dies, fixtures, that type of productive equipment, which had to mean equipment that you

use in a plant and that is what I think these words meant and covered nothing more.

Q Can you cite any instance or any assertions whereby anyone involved in the negotiations which led up to that document insisted or said or stated or asserted in any way in writing or orally that the residual of that Seatrain-Fruehauf lease was going to pass to Strick Corporation pursuant to the document?

A It was not a subject of conversation as far as I know at all with anybody.

MR. PRATT: No further questions.

CROSS-EXAMINATION

BY MR. CANTOR:

Q Mr. Rushmer, forget about the Seatrain situation specifically.

Is it your understanding that leased trailers, any leased trailers, were sold to the Strick Trailer Corporation under that agreement, that January 11th agreement?

A Well, if they were described in the balance sheet, the assets to be sold had to be described in some fashion and if they were in the balance sheet as an asset of our Strick Division, it was one of the assets that presumably would be transferred.

If you are talking about leased out, if you are talking about leases which like Seatrain, the property manufactured, threw off through its division and entered into a lease with the person that wanted to use the equipment and if there were any assets of value there and if it were meant to go under this transaction, we would have been glad to sell it if it was such an asset.

To my knowledge I know of no such arrangements.

Q So your testimony is that no leased trailers were sold to Strick?

A That is not my testimony. I don't know.

Q You don't know one way or the other?

A That is right.

Q Were you in court this morning when Mr. Silverstein said some leased trailers were sold?

A That is right. He would be aware of it; not I.

Q So you don't really know the specifics of what were sold under this agreement, do you?

A I know what was intended to be sold in terms of the particular words of transfer that has been pointed out on page 4.

Q Were leased trailers intended to be sold under those words of transfer?

A The only thing that would-- the answer is no.

Q What words of transfer transferred the leased trailers that Mr. Silverstein told us about this morning?

A I don't understand, Mr. Cantor.

Q You have told us that you have no reason to disagree with Mr. Silverstein's testimony that leased trailers were sold under this agreement, is that correct?

A Very well. If that is what his testimony is, I believe it.

Q Let me ask you to assume that is what his testimony was.

What I am asking you is: Under what language in the contract were leased trailers sold if it was not sold under the language you say it was not sold under?

A I don't understand your question. My testimony with respect to this language, this was describing plant, not products sold or leased by the Strick Division.

Q Let me get the actual language out so I will be up with you.

We are talking about Plaintiff's Exhibit 4, Paragraph 4(a) which begins on page 3, is that correct, and carries over until page 5?

A Yes.

Q My question is: Whether under Paragraph 2(a), on the assumption that Mr. Silverstein is correct, that

leased trailers were transferred, what language under 4(a) transferred them, if it is not the language that you said did not transfer them?

A Well, I don't know the answer to your question, Mr. Cantor. What I have tried to testify to is what I thought this language meant and I thought it was restricted soley to production equipment used in plants.

Q But if Mr. Silverstein is correct, and in fact--take a look at Defendant's Exhibit E for identification as marked at the depositions, and let me know if you know what this document is.

A I recognize it as a certificate by accountants as to a dollar statement of assets and liabilities relating to the agreement of January 11, 1966.

MR. CANTOR: I will offer it in evidence. I think the plaintiffs actually produced it since it came from their files.

MR. PRATT: No objection.

xx (Defendant's Exhibit E received in evidence)

Q Mr. Rushmer, take a look at the third page of Defendant's Exhibit E.

A The statement of assets and liabilities by the accountants?

Q Yes. You see on the third page the item

"Equipment Leased to Others."

A You are speaking of the balance sheet. Is that what you are looking at?

Q That is correct, the proved-out balance sheet. It is under "Other Assets, equipment leased to others."

A I see that.

Q So in fact equipment leased to others was one of the assets transferred, is that correct?

A Apparently so.

Q Your understanding, however, or at least your testimony is that the phrase "moveable equipment used in the operation of the Strick Division,"whether or not given a carrying value on the balance sheet, that language from Paragraph 2(a) did not include leased trailers, is that your testimony?

A Well, leased out to others. My testimony is it was not included. There were moveable trailers. Strick Division used trailers to store records. They used tractors. All of them perhaps were depreciated. This was my understanding of the sense of this thing that if they had moveable equipment in their plant like trailers to store books and records in it, like tractors to pull trailers in the course of manufacture or like forklift trucks, all of which would be written off.

Q If you look at Defendant's Exhibit E, you see that the equipment leased to others is given a value of almost $3,200,000.

That is a lot of dollies to carry books around?

A That says whether expensed or not. That is what I was thinking about.

The amount you see there to me is a description by an accountant. I do not know on what basis they arrived at that figure for that purpose.

Q You weren't really involved, were you, in the nuts and bolts of whether this lease was sold and that lease wasn't sold?

A That is correct.

Q You don't know of your own knowledge whether the Seatrain lease was meant to be included or not, do you?

A I know that this language would not cover such a transaction.

Q Which language, on the top of page 5?

A Yes.

Q You know that of your own knowledge?

A That is my opinion as a lawyer.

Q Your opinion is based on what, sir?

A The negotiations that led up to the inclusion

of this language in this contract.

Q Did you ever ask Blair Smith -- he is deceased, is that correct?

A Yes, five or six years ago.

Q Did you ever specifically ask Blair Smith whether the Seatrain lease was included in that language?

A Of course not.

Q He never told you it was not included?

A It wasn't ever discussed, Mr. Cantor.

Q Let's take a look,if we might, at Plaintiff's Exhibit 8 in evidence, which I believe is the 1972 assignment, and if I can look over your shoulder because I don't have my copy out -- this is a document by which the Fruehauf Finance Company, at the expiration of the lease purports to assign its right, title and interest back to the Fruehauf Corporation, is that correct?

A Can I answer it this way, Mr. Cantor?

This is the form our law department gave to the Finance Company to use whenever we required reassignment of property to Fruehauf Corporation, so it could enforce its terms, the reason being --

Q The only thing I am trying to get is whether this document relates to the equipment we are talking about here and it is a document by which the Finance Company

purports to assign it back to Fruehauf Corporation.

That is all I am really asking.

A There is no question. The document says what it says.

Q What is the consideration for the assignment?

A I have not any idea.

Q There is none stated in the document there?

A No.

Q Do you know of any payment that was made for that assignment?

A Not for this particular assignment. I can describe what our regular course was.

Q Let me ask you this: Do you know whether anything was paid for that particular assignment?

A Not to my knowledge. I have no knowledge about it whatsoever.

Q Let's look if we can at Plaintiff's Exhibit 9 which begins with the letter dated December 15, 1964.

If you would look at the ninth page of that document, you will see a one-page assignment in which, and just tell me if my understanding is correct, the Fruehauf Corporation purports to assign to the Fruehauf Finance Company, the so-called "customer obligations" as defined in the purchase agreement dated December 15, 1964; is that

correct? Is that what this document is?

A That is what the document says. It says "For value received the undersigned Fruehauf sells to the Finance Company" -- I am not reading literally - - all of the customer obligations as defined in an agreement.

MR. CANTOR: Does your Honor have a copy of this? It is Plaintiff's Exhibit 9.

THE COURT: No, I do not.

Q My question, Mr. Rushmer, and let me put it again:

This document purports to be an assign whereby the Fruehauf Corporation assigns to the Finance Company the so-called "customer obligations" as defined in the agreement of December 15, 1964, is that correct?

A That is the language of the assignment.

Q And the so-called agreement of December 15, 1964 is in fact the first eight pages of Plaintiff's Exhibit 9, is that correct?

A That is what it appears to be to me. I have not read it.

Q The term "customer obligations," the thing that is being assigned, customer obligations, is in fact defined, is it not, on the first page of Plaintiff's Exhibit 9, the December 15th letter, and just read to yourself the first paragraph.

A I understand what it says.

Q Is that in fact correct, the customer obligations is defined?

A It is defined.

Q And customer obligations are defined as a separate installment contract?

Mr. Rushmer, customer obligation is executed for each sale of personal property.

Do you see that language?

A Yes.

Q Was there any sale of personal property by Fruehauf to Seatrain?

A So far as I know, Fruehauf leased personal property to Seatrain.

Q It was not a sale, it was a lease; so to the extent anyone is contending that the Fruehauf situation was a customer obligations within the meaning of this document, it would not fit because this document defines customer obligation as a sale of personal property, not a lease, is that correct?

A I am not sure.

Q Didn't you say you drafted this document?

A I have not studied it for twelve years.

Q Take your time and study it.

MR. PRATT: Your Honor, I will object to the whole line of questioning and it is as follows --

MR. CANTOR: Judge, he offered the document.

MR. PRATT: To complete the record -- let me complete my objection.

Whether or not Fruehauf Trailer Corporation conveyed or did not convey an asset to Fruehauf Finance Corporation, which is clearly beyond question vis-a-vis Seatrain Lines, or what it did with it, or didn't do with it, has absolutely nothing whatsoever to do and will never have anything whatsoever to do with the issue in the case as though something worth an agreed upon, $100,000, and we maintain $400,000,passed by an agreement January 11, 1966 from its owner to Strick Corporation.

I don't know whether or not a strawman is being erected here but I would gladly stipulate that we are not in any way, shape or form saying that anything happened vis-a-vis Seatrain Lines and Fruehauf Corporation to change that lease obligation, and I thought I made that clear in my opening statement. But there seems to be some sort of a warp in the logic of this whole thing.

I am listening to the testimony and will listen to a lot more of it, but unless there is some connection where some internecine or intramural bookkeeping really

between Fruehauf Corporation and part of its property, namely, Strick Division, has something directly bearing on whether a sale is made of a specific asset, I don't know why we are wasting all the Court's time with this, and that is the genesis of my objection.

THE COURT: The Court understands your position and will take this evidence and determine on all the evidence what weight to give it.

MR. CANTOR: Your Honor, I have even a further simplification.

If Mr. Pratt would like to withdraw the offer of Exhibit 9, I will ask no questions about it but if it is in evidence, I have to inquire about it.

THE COURT: Go right ahead.

Q Mr. Rushmer, have you had a chance to study this document or would you like a few more minutes?

A I have examined it. It looks like it is a special transaction that was developed for the purpose of enabling Fruehauf Corporation to acquire from the Finance Company some money by way of pledging or selling these customer obligations that were not permitted earlier on under the then-existing loan documents.

That is what comes to my mind at the moment. I think that was a reason for this piece of paper.

Q My point is, the only thing that was assigned was customer obligations, is that correct? Page 9 of the instrument says that?

A Yes. I don't have any problem with that.

Q Customer obligation is a defined term, is it not, in this document?

A These particular customer obligations as defined, as the agreement says.

Q And one of the definitions of customer obligation is an installment contract executed for each sale of personal property.

Do you see that in the first paragraph on page 1?

A I understand what it means.

Q The Seatrain lease was not a sale of personal property, is that correct?

A The Seatrain lease to me, Mr. Cantor, was a lease between Fruehauf and Seatrain to hire some trailers and equipment and return the stuff to us when the lease expired.

Q It was not a sale?

A No.

Q The next sentence says: "Customer obligation provides for a fixed down payment."

Was there a fixed down payment in the transaction between the Strick Division of Fruehauf and Seatrain?

A I would have to look at the document. I assume not.

Q The next sentence says: "Fruehauf retains a security interest in the equipment sold until the terms of the customer obligation are fulfilled."

Was any security interest retained by Fruehauf with respect to the Seatrain matter?

A Ownership of the property.

Q But title was never transferred to Seatrain in the first place?

A That is correct.

Q So no security interest in the sense of a chattel mortgage or conditional sales contract or anything that you would file under the UCC --

A There was no mortgage and no lien. We owned the property. We leased it to them and they were supposed to send it back to us.

Q Take a look at the third page of Plaintiff's Exhibit 9. Take a look specifically at Paragraph 4(a) which reads:

"We hereby covenant, represent and warrant with respect to this agreement and the customer obligations

sold hereunder, that is, sold by Fruehauf Corporation to Fruehauf Finance, that: (a) at the time of the sale, each customer obligation is owned by us free and clear of all liens, charges and encumbrances, and will then represent a legal, valid and binding obligation of a bona fide purchaser of equipment from or through us."

Was Seatrain a bona fide purchaser of equipment?

A I can only repeat, I have read the Seatrain lease. To me that document was a lease of property by Fruehauf to Seatrain, at the termination of which lease, the obligation of Seatrain was to return the leased property in as good condition as it was.

That is to me what the Seatrain lease was.

Q Is it fair to say, therefore, that the Seatrain lease was not a "customer obligation" within the meaning of Plaintiff's Exhibit 9, since it was not a sale and since Seatrain was not a bona fide purchaser, and since there was no chattel mortgage and since there was no fixed....

A This definition of customer obligation is just as you have read it into the record.

How can I say anything further?

Q You can agree or disagree with my proposition.

I am asking you, was the Seatrain lease a "customer obligation" as that term was defined in Plaintiff's

Exhibit 9 which you drafted, yes or no?

A Was it a customer obligation? It was not a conditional sales contract, it was a lease. This definition appears to say, and I have not read the whole document at all, appears to say that a customer obligation under this piece of paper is a conditional sales contract as distinguished from a lease.

Q So if the document says what it purports to say, then your answer to me would be that the Seatrain lease was not a "customer obligation?"

A It does not seem to fit "customer obligation" as defined in this agreement.

Q Mr. Rushmer, I believe you told me at some length and at some pain that you were very much involved in the whole FTC proceeding from the beginning to the end, is that correct?

A Yes, that is correct.

Q In fact, I take it, you were involved in the negotiations that led finally to the resolution-- not the resolution with the Strick people, but the negotiation with the FTC whereby they basically agreed, without characterizing it specifically, that they would drop the claim with respect to the Hobbs Division if the Strick Division was fully divested.

Is that a fair statement?

A No. I was aware, of course, by telephone communication by Mr. Smith, who had access to the Federal Trade Commission to better advantage than I had and he undertook, if we could get this treatment trying to decide whether the assets were what the Commission and the Court had in mind, he undertook to obtain its approval.

I had nothing whatsoever to do with what happened.

Q All I am getting at, when the final FTC order came down on May 28, 1965, it required divestiture not just of Strick but of Hobbs, as well?

A I think that is correct.

MR. CANTOR: I would ask your Honor to take judicial notice of that as a published opinion.

Q Finally, as modified by the Court of Appeals, all that was divested was the Strick Division?

A Yes.

Q And Fruehauf was allowed to keep the Hobbs Division?

A It was not ordered to be divested.

Q In fact, an order was entered by the Court of Appeals and I ask you to look at AD for identification and ask you whether thatin fact is a copy of the order as

entered by the Seventh Circuit, modifying the Trade Commission order?

A Yes, that is what it appears to be.

MR. CANTOR: I will offer it, your Honor.

MR. PRATT: No objection.

xx (Defendant's Exhibit AD received in evidence)

Q Mr. Rushmer, take a look at the bottom of page 2 and the top of page 3 and let me read to you the following language:

"It is ordered that (a) Respondent, the Fruehauf Corporation, a corporation, and its officers, directors, agents, representatives and employees, shall within one year from the date of this order, divest itself absolutely in good faith of all assets of its Strick Trailer Division and such other assets as may be necessary to restore the Strick Company and Strick Plastic Company as a competitor in all lines of commerce in which it was engaged immediately prior to its acquisition by respondent."

"As used in this order, 'assets' shall include any properties, rights and privileges, tangible and intangible, including but not limited to plants, machinery, equipment, contract rights, patent rights, licenses, trade names, trademarks, and goodwill of whatever description."

Were you aware at least of the substance of this

language during the period that you were involved in the negotiations for the divestiture?

A You mean the negotiation for the agreement of January 11?

Q Yes.

A I can't say whether we had this before or not. I look at the date and it appears to be after the agreement of January 11.

The final order is dated January 21, so I have to assume that the agreement of January 11 was duly executed, sent on to Blair Smith, and submitted to the Court as being in compliance with the arrangement that had been made.

That's all I can get from it.

THE COURT: How did this happen to come before the Court of Appeals? Had there been pending some proceeding with respect to the order of the Federal Trade Commission?

THE WITNESS: Yes, your Honor. We were going to appeal the Federal Trade Commission order in Chicago and pending that, and we filed appropriate papers -- pending that, various offers to acquire these assets were made to the company and I think this Court received the Commission order and this agreement to say we have accomplished

what was ordered.

Q Just so there is no confusion as to when the language was first on the table- - let me ask you this:

This language did not spring full blown from the Court of Appeals, did it? It was language that was worked out between Fruehauf and the FTC to be presented to the Court of Appeals as a settlement of the appeal.

A I think, Mr. Cantor, it was language worked out by Mr. Blair-Smith on behalf of the Strick Company, that was eager to acquire these assets, and he really is the one who prepared the order, which satisfied the Federal Trade Commission.

THE COURT: The first paragraph of the order answers your question, does it not? Joint motion and affidavit by the petitioner and respondent.

MR. CANTOR: That is correct. The petitioner and respondent were in fact the Fruehauf Corporation and the Federal Trade Commission.

Q Is that right?

A The petitioner and respondent, you have described it correctly, yes.

Q In fact, sir, if you take a look at Defendant's Exhibit AC, I will give you a copy and a copy to the Court -- isn't AC in fact a copy of a letter from

Mr. Welch, your attorney, to the Federal Trade Commission, enclosing a draft of what ultimately became the final order?

A Yes, this is a letter from Mr. Welch to the Federal Trade Commission, dated January 11, the same date as this agreement was dated.

THE COURT: Mr. Welch was the Fruehauf attorney?

THE WITNESS: He was our Washington counsel on the Federal Trade Commission matter, your Honor.

Q Mr. Rushmer, is it your recollection that the joint motion obviously was made during the course of the negotiations between Fruehauf and the purchasers of the Strick Division, is that correct?

A I think it was obvious, yes.

Q So that language, the basic language, that all assets be divested and the term "assets" included any rights, tangible and intangible, and so on, as reflected in AC, that language had been worked out with the FTC during the course of the negotiations between Fruehauf and the Strick Trailer Company?

A Your time might be right.

THE COURT: Is that marked, this letter from Welch to the Federal Trade Commission?

MR. CANTOR: I offer it.

MR. PRATT: I don't see any relevance to it but I won't object to it.

xx (Defendant's Exhibit AC received in evidence)

Q You were starting to answer the question, the language contained in the final order,AD, the definition of the word "assets," first that the Fruehauf Company shall sell all assets and then the definition "assets"; shall include all property rights and privileges, tangible and intangible, and so forth, that language was in the contemplation of the parties,was it not, during the course of the negotiations that culminated in Plaintiff's Exhibit 4, which is the purchase agreement?

A I attended most of the negotiations and I can say to you that this language was never known, at least to me. This is just standard antitrust language as far as I am concerned but we were not aware during our negotiations precisely what the Federal Trade Commission was going to want in relation to compliance with their order.

THE COURT: What is the exhibit number of the order of the Court of Appeals which is attached to this letter from the Clerk of the Court of the Seventh Circuit?

MR. CANTOR: That is AD, your Honor.

Q Sir, perhaps I am overworking this point, but Mr. Welch was Fruehauf's attorney.

He was your Washington antitrust lawyer and he would not have made a joint motion with the FTC joining the motion on behalf of Fruehauf without having the authorization of Fruehauf to do so, is that a fair statement?

A That is a fair statement.

Q So he wouldn't have inserted language, all assets, et cetera, et cetera, unless Fruehauf had authorized him to do that?

A Mr. Welch was working with Mr. Blair-Smith and counsel for the Strick group that wanted to buy these assets and I have to believe that he worked very carefully and strongly with the counsel for the Strick group that wanted to buy the assets.

He kept me informed that he was trying to arrange what he was trying to arrange and he sent me a copy of the final order.

Q You would certainly not contest the fact that Mr. Welch was acting as a representative of the Fruehauf Corporation?

A Of course he was.

Q One final question and we will be through.

This deals just with valuation and I know you are not an expert or I assume you are not an expert on the

value of this equipment and what it is worth.

A You are right.

Q In fact, sir, you wrote a memorandum to Mr. Grace in August of 1972 in which you told him that the residual value of the equipment was worth $100,000, is that correct?

A If I did, I did it on somebody else's telling me what the value was because I know nothing about valuations.

Q Do you remember, yes or no, whether you wrote such a memo?

A No, I don't, but I very likely did.

Q Let me get a copy of the memorandum.

Look at the document marked K-1 for identification.

Does that refresh your recollection that in fact you wrote a memorandum to Mr. Grace on August 7, 1972 in which you informed him that the residual value was $100,000?

A It does refresh my recollection. My initials are on it.

Q And you did so inform Mr. Grace at that time, is that correct?

A This is a copy of a memo I wrote to him, so I

guess it has to be that I informed him.

Q Do you remember where you got that information from that the residual was worth $100,000?

A I don't remember precisely but I can tell you where the normal source of such information would be available to me if I inquired.

Q Was it Clark Abbott?

A No, it would have been someone in our finance company-- it would be a financial person I would get it from.

Q You don't know who it might be?

A No. I may have gotten it from Clark Abbott.

Q You got the name from Clark Abbott?

MR. PRATT: I will object to this line of questioning with this qualification.

If the defendants' attorney is offering this testimony or eliciting it for the purpose that it was said, then I have no objection, that someone said something was worth $100,000 or was not, fine. If he is offering it for the truth of those allegations, I will object to it, first on the ground of hearsay, and second, that there is absolutely no foundation laid for any valuation through the present witness.

That is absolutely as clear as crystal.

MR. CANTOR: Something I guess is not clear to me.

I am asking this person what a Fruehauf person told him which gets me around the hearsay problem because it is an admission.

I am not trying to qualify this gentleman as a witness on valuation. I am just trying to find out the name of the person that told him it was worth more than $100,000 since they are now suing for $400,000.

MR. PRATT: I don't think that is an admission. If the janitor at the Fruehauf plant said the equipment was worth $100,000, then I don't think anybody would put the slightest bit of credence into it.

THE COURT: If this was a figure that was carried on the company's books, it might be entitled to some weight. I suppose that is your point.

MR. CANTOR: My point is, for three years we were being sued for $100,000 and all of a sudden it went up to $400,000. I want to know who at the time gave Mr. Rushmer the figure. If it was the janitor, we could discount it but I don't believe it was the janitor.

MR. PRATT: I am not objecting to this line of inquiry if Mr. Cantor is trying to establish that something was said, although it is a little bit late for

discovery.

However, I am going to object strenuously if Mr. Cantor is going to try to give any credence to an unknown witness as a value expert or to try to establish Mr. Rushmer as a witness who knows anything about the valuation.

MR. CANTOR: Judge, isn't the first question whether Mr. Rushmer remembers who told him that and after that we can fight about what probative value it has.

THE COURT: I think the witness' recollection has been refreshed, has it not?

THE WITNESS: I do not, your Honor, know where I got the number $100,000 to put in my memo.

THE COURT: But you did send such a memorandum?

THE WITNESS: Yes.

Q And you don't normally take advice on residual values from a janitor, do you?

A No.

REDIRECT EXAMINATION

BY MR. PRATT:

Q Let me show you a document entitled "Consent Agreement," dated December 15, 1964, between the Prudential Insurance Company of America and Fruehauf Finance Company, and ask you if you are familiar with it.

A I remember such an agreement, yes.

MR. PRATT: I would like it marked Plaintiff's Exhibit 10 for identification, and I will offer it in evidence.

MR. CANTOR: I take the same position on this as I did on others. I do not concede it has any binding effect on the defendants or that they knew about it, but as far as it being a copy of an agreement between Fruehauf Finance and the Prudential, I have no reason to doubt that fact.

xx (Plaintiff's Exhibit 10 received in evidence)

MR. PRATT: I am not offering it for any purposes of trying to change the lease document, quite the contrary.

I will stipulate that it does not.

I would just like to characterize the three documents that I have put into evidence through the witness.

Q Mr. Rushmer, is it true that Fruehauf Corporation by means of its Finance Company devised a way through bookkeeping transactions to obtain more money for their leases --

MR. CANTOR: Judge, I will object to this line. We have had an accountant on the stand this morning familiar with all of this. Mr. Rushmer is an attorney.

There has been no testimony as to his qualifications and I submit most respectfully what is happening is an attempt to avoid cross-examination of Mr. Silverstein by asking questions of Mr. Rushmer about the financing aspects.

If Mr. Pratt wants to put Mr. Silverstein back on --

THE COURT: How does this relate to the direct testimony?

MR. CANTOR: I would object on that ground as well.

THE COURT: I don't wish to stand on that.

MR. CANTOR: Judge, Mr. Silverstein is here. Let's put him back on the stand and get an explanation. What it is doing is hindering my cross-examination.

THE COURT: Do you think Mr. Silverstein can shed some light on this which this witness cannot? Of course, you can call him and examine him.

MR. PRATT: I will consent to that.

MR. CANTOR: If you want to put Mr. Silverstein back on --

THE COURT: I must say, I don't understand the relevance of the exhibit but I assume you have something in mind.

MR. PRATT: Then I won't ask Mr. Rushmer any further questions about it and I will put Mr. Silverstein on for a brief period so I can characterize what I understand to be a misunderstanding.

MR. CANTOR: Then I take it there is no question pending and I have no further cross-examination.

(Witness excused)

MR. PRATT: Can I briefly recall Mr. Silverstein?

THE COURT: Certainly.

A D O L P H T. S I L V E R S T E I N,

resumed:

DIRECT EXAMINATION

BY MR. PRATT:

Q Mr. Silverstein, did Fruehauf Corporation find a way in 1964 to obtain some more money for the corporation or something of value for the corporation through an intramural changing of a lease into a contract of sale?

A By changing the accounting treatment accorded the lease, we were able to, in effect, have the Fruehauf Corporation borrow more money or receive more money, actually, from the Finance Company than would be the case if the transaction continued to be characterized in the accounting as a lease.

Q Take a look at Plaintiff's Exhibits 8, 9 and 10

and explain the significance, if any, of those documents in connection with that project of Fruehauf Corporation.

A Plaintiff's Exhibit 8 is the assignment in 1972. I think it is not germane to what we were talking about. That is the assignment of the rights back to Fruehauf Finance which I think -- back to the parent company from Finance which is not 9 and 10.

9 and 10 had to do with the transfer of some customer obligations, Fruehauf Corporation was about to embark on reporting income for federal income tax purposes on the installment method.

There were certain relief provisions in the Internal Revenue Code so installment receivables that originated prior to the time you go on the installment method, but are converted into installment obligations after you adopt the method, you in effect have to pay income tax on them twice.

Therefore, it was necessary for Fruehauf Finance to acquire at the time Fruehauf Corporation adopted the installment method for reporting income, to have Fruehauf Finance buy the receivables which would ultimately culminate in what was handled for tax and accounting purposes as installment receivables and we adopted the installment method January 1, 1965, and that is what 9 and 10 do.

These documents did not technically meet their definition of customer obligations and there is a long background on what is and is not a customer obligation.

Some leases were in fact customer obligations, with no bearing on this court case.

Both documents were done as a condition that had to be completed before Fruehauf could go on the installment method in order to minimize its income tax.

It has no bearing on Seatrain except to the extent that Seatrain was one of the customer obligations as defined that was transferred.

Q Does any of this testimony which you have given or what you have heard concerning this accounting and tax treatment of these documents and these obligations and so forth and so on, as you understand it, have anything to do with the issue of whether or not a residual under the Fruehauf-Seatrain lease passed to Strick Corporation pursuant to the January 11, 1966 contract?

A In my opinion, they do not pertain to the issue.

MR. PRATT: That is all I have.

CROSS-EXAMINATION

BY MR. CANTOR:

Q You are saying Plaintiff's Exhibits 9 and 10 have no relevance to the issue of whether the residual

passed under the agreement, at least so far as you understand it?

A Yes, that is what I would say.

Q Since we have Plaintiff's Exhibit 9 in evidence, and I am still not sure why we have it since it is not relevant, but take a look at the next-to-last page of Plaintiff's Exhibit 9.

A Yes.

Q That in fact is the proof, is it not, where Seatrain is listed there and the amount listed of $1,338,240.69, is the proof that the Strick Division got no credit for the residual but only got credit for the lease payments?

A Yes, I would agree with that.

Q Furthermore, you heard Mr. Rushmer's testimony, and let me run through it quickly with you.

Take a look at Plaintiff's Exhibit 9 on the first page. The term "customer obligation" is defined as an installment contract for a sale of personal property.

That does not technically fit the Seatrain situation, is that correct?

A I would agree with those words.

Q With my words, that it does not technically fit the Seatrain situation?

A Well, I may be saying things I shouldn't say. I am not a lawyer, but there are other definitions of "customer obligations," vis-a-vis the Prudential Insurance Company and the Finance Company.

Q I beg to differ with you. The agreement with the Prudential talks about "customers paper," not "customers obligation."

A I used those terms interchangeably and maybe I should not.

Q The term "customer obligation" which is the term used in Plaintiff's 9 is a defined term, it is a term which is defined within the agreement, Plaintiff's 9?

A You ask me as a matter of law is it? I don't know. Clearly they are trying to indicate that is what they mean by a customer obligation.

Q Let's do it this way: I don't mean to beat a dead horse or an irrelevant document, but the Seatrain situation was not a sale of personal property?

A We all agree on that.

Q There was no fixed down payment, correct?

A Yes, there was no fixed down payment.

Q Seatrain was not a bona fide purchaser as that term is used on page 3 of this document, is that correct?

A Well, from an accounting standpoint, the accounting

treatment accorded that was that that was a sale and therefore so long as we treat it that way for accounting, I think this again, from my standpoint, at least, is like an accounting document.

How we handled these things for accounting and for tax and for those areas, I feel well qualified to be quoted an expert witness, whatever that may be.

Q But it is not your testimony here, one way or the other, as to whether Seatrain was in fact a bona fide purchaser, or what is your testimony?

A I am saying that-- I cannot say -- all I can say is why it was done, what the accounting consequences were, what the tax consequences were.

Q We know for a fact that Seatrain did not get title. At least Fruehauf claims that.

A I think Strick does also, otherwise none of us would be here.

Q If this were a classic conditional sales contract, we wouldn't be in court today?

A There is no question. The title would vest in Seatrain.

MR. CANTOR: No further questions.

REDIRECT EXAMINATION

BY MR. PRATT:

MR. PRATT: My question to Mr. Silverstein was in all this body of testimony and so forth, documentation, everything, was not germane to the issue.

I think Mr. Cantor possibly characterized or tried to encapsulate that in a question right after that to Mr. Silverstein that the three documents I introduced were irrelvant.

Q I want to make sure what you testified to.

I am saying, I am asking you again, although I think the record will stand, whether all the colloquy here about accounting treatment and so forth and all documents and so forth that had to do with the Fruehauf Finance, Fruehauf Corporation tax treatment and everything else, I am saying, is it your testimony it had nothing to do with whether or not a residual interest passed under the January 11, 1966 contract?

A In my opinion they do not.

MR. PRATT: I just wanted to reclarify that.

MR. CANTOR: Nothing further.

(Witness excused)

THE COURT: Does that finish what there is to be presented today?

MR. PRATT: Yes.

We have one more witness, an expert witness.

THE COURT: I think tomorrow we will convene in Room 2704 on the 27th floor at 9:30 and see if we can't get better lighting.

The lighting in this room is the worst I think I have ever seen in a courtroom anywhere any time and I apologize that you have been subjected to it, and hope your eyesight will not be too impaired as a result of it.

We will recess until tomorrow at 9:30 and it is my intention not to sit on Friday, but to sit on Monday and Tuesday if need be.

MR. PRATT: I would hope we can get the case finished.

MR. CANTOR: Let me say after the plaintiff rests, we will have motions, but on the assumption that we start, I would be surprised if we would be able to finish tomorrow.

THE COURT: But you will be prepared to go the full day if need be?

MR.CANTOR: Yes.

(Court adjourned to 9:30 a.m., December 9, 1976)

FRUEHAUF CORP.

v. 73 Civ. 120

SEATRAIN LINES, Inc. and
STRICK CORPORATION

December 9, 1976
9:30 a.m.

(Trial resumed)

MR. PRATT: Your Honor, counsel for the defendants and myself are going to enter into a stipulation regarding the third cause of action which is limited to an inducement to breach of contract against Strick Corporation.

We will make a stipulation as follows:

Strick Corporation was aware that Fruehauf Corporation claimed the leased equipment under the Fruehauf Corporation-Seatrain lease and Fruehauf Corporation was aware that Strick claimed the equipment under the same lease.

Strick Corporation offered an indemnity to Seatrain Lines and Fruehauf offered an indemnity to Seatrain Lines.

Seatrain accepted Strick's indemnity and did not accept Fruehauf's indemnity and did not turn the equipment back to Fruehauf at the termination of the lease.

Is that correct?

MR. CANTOR: Yes.

The equipment was never returned. In fact, Judge, it was on location, it stayed on location and appropriate consideration was received by Strick for the equipment, but there is no dispute that the equipment was never returned to Fruehauf and that Strick was aware of Fruehauf's claim as Fruehauf was aware of Strick's claim.

THE COURT: Very good.

MR. PRATT: Your Honor, I would like to call to the stand at this time our expert witness as regards damages, Mr. Henkels.

C E C I L H E N K E L S, called as a witness by the plaintiff, being first duly sworn, testified as follows:

MR. CANTOR: Your Honor, we have had a pretrial order in this case and an amended pretrial order in which all witnesses and in particular all expert witnesses, because there was some motion practice about that, were to be named.

Mr. Henkels' name has never been mentioned.

There was a provision in the pretrial order drafted by Mr. Mountan that said no witness shall be called if not identified in the pretrial order.

If this were a fact witness to identify a document or something, I would have no problem. In fact, the plaintiffs put in some documents yesterday not identified in the pretrial order and I made no bones about it, but this is an expert witness, as to which clan we had taken depositions on some experts and the plaintiff took them of us. We had the right to interview all expert witnesses.

The first I heard of this gentleman's name is when I saw your clerk this morning writing it down. I had never heard about him before and I submit it would be prejudicial and flatly contrary to the pretrial order and particularly paragraph 5 of the pretrial order which says explicitly "No witness may be called to trial unless identified in this pretrial order or a supplemental pretrial order."

THE COURT: What is the date of the order?

MR. CANTOR: The date of the original order is June 17, 1974 and it was amended with the addition of further witnesses on damages on December 12, 1975, and just to give you the background on why this is important, Judge, in the original pretrial order, there was no issue

about damages at that point.

The parties had stipulated on valuation. Mr. Mountan then made a motion before Judge Carter to reopen. Judge Carter allowed further discovery in which purported expert witnesses were deposed and it was a full deposition by both sides.

Then further witnesses were identified by the plaintiff on the question of valuation and they did not include Mr. Henkels and we have had no notice of Mr. Henkels, no opportunity to depose him, to interview him, and I respectfully submit he should not be allowed to testify.

MR. PRATT: Your Honor, I would oppose that motion. The whole reason for the postponement of this trial for two years has been because of the fact the damages were incorrectly stated in the original complaint and we subpoenaed one expert witness who has chosen to ignore the subpoena and I frankly just got into the case about a week ago, but the key thing to this whole thing, the second part of our case is damages, so as I see it, nothing at all has been proved about damages and we need this expert witness.

Now, whatever reasonable time or however we can fit it in, I am perfectly willing to let the other side

interview Mr. Henkels or do whatever they want, but we went to great time and expense to get this witness, and in the interest of flat-out justice, he should be allowed to testify in this case.

I think if counsel wants to interview Mr. Henkels, maybe it could be done at the lunch hour, but I don't think it's that much of a surprise. He is going to give expert testimony just like a surgeon would or somebody in mechanical construction.

THE COURT: Yes, but after all, these pretrial orders have some purpose and the purpose is to save time and eliminate surprise.

However, it seems to me the thing to do would be to have you go ahead with direct examination and if counsel, Mr. Cantor, would like to defer cross-examination until he has had a chance to interview the witness, and a few days additional, Mr. Cantor can postpone his cross-examination of the witness until Monday,and that will give you all day tomorrow to interview the witness and to make such decisions concerning his cross-examination as you think should be made, and including, of course, anything you might need to do with respect to meeting this testimony which may not already have been done.

So I think we will go ahead with the direct

examination and give you those opportunities to interview the witness and postpone your cross-examination of the witness until Monday.

MR. CANTOR: If your Honor has so ruled, obviously we will abide by it, but the pretrial order that was entered did identify two Fruehauf employees who were supposed to testify about damages.

We had the opportunity to depose them under oath in a more leisurely manner than ever will be possible between now and Monday with the gentleman who is being brought in from White Plains, as I understand it. It is not quite the same thing.

I am not saying that the prejudice is so great that Strick will be knocked out of court on the issue of valuation, but there was a gentleman named Clark Abbott and there was another gentleman named William Hadley, both Fruehauf employees. We had the opportunity to depose both of them just as plaintiff had the opportunity to depose our employee, and I don't quite understand why at the last minute neither of those gentlemen are being brought in to testify.

THE COURT: You did depose them?

MR. CANTOR: Yes.

THE COURT: To the extent what they said could

constitute an admission against interest, you can use that deposition.

MR. CANTOR: I am just not being given the same opportunity with respect to the fellow who is now being brought in.

THE COURT: You can spend all day tomorrow talking to him and Saturday and Sunday, and if that is not enough, we will give you more time on Monday.

MR. CANTOR: I am sure that will be enough.

DIRECT EXAMINATION

BY MR. PRATT:

Q Mr. Henkels,would you please tell us your present occupation?

A I am President and General Manager of a small used equipment company, buying and selling containers, chasses, semi-trailers in the used business only. That has been about the last two and a half years.

Q Would you please tell us the name of that corporation?

A CBA International Inc.

Q And its location?

A The office is located in White Plains and the yard is located in Port Newark, New Jersey.

Q Tell us what is the type or types of used

equipment that you sell and buy, whatever?

A Primarily it is containers and chassis for the marine intermodal..

When I say intermodal, it goes on ships, on rail and by truck. It is a piece of equipment that is interchangeable to any one of those operations.

Q Would this include a container such as could be lifted on and off an ocean transport ship?

A It does.

Q Does this also include a bogie?

A Yes. Although there aren't too many of them around any more.

Q Would this include refrigerator units?

A Yes.

Q And also the generator sets to power those?

A Yes.

Q And you have been doing this for the past two and a half years?

A Yes, sir.

Q And it is used equipment?

A Yes, used equipment.

Q Now, in order that I won't have to ask an awful lot of questions and you can give a comprehensive narrative, beginning with your earlier experience in the

transportation industry, would you please tell the Court, using the companies, dates, times and places, what you did, your business experience; take your time and narrate it out.

A I started in 1933 in the moving and storage business in Sioux City, Iowa. Just as a clerk. Then as time went on, this particular company, Dougherty Storage & Van Company, started an over-the-road freight operation between Minneapolis, Sioux City, Omaha and Kansas City.

At that time I was made terminal manager in Omaha, Nebraska, about 1935, 1936.

I resigned from that job and went with another transportation company known as Brown Transportation of Kearney, Nebraska. I was their general manager for their eastern terminals.

Q What were your duties there?

A To supervise their terminals and operation of their equipment.

Q What did they do?

A Trucking company. Over-the-road trucking company, operating out of Omaha, Nebraska, for the State of Nebraska.

Then following that, during the war, I was general traffic manager of Glenn L. Martin Aircraft

Corporation in Omaha, Nebraska.

Following that I operated my own trucking line operating out of Omaha to Cheyenne and Denver, Colorado and intermediate points.

Q What type of truck?

A A motor carrier, common carrier of general merchandise.

Q This is after World War II?

A Yes.

Following that I sold that to Watson Brothers Transportation Company and became an employee of Watson Brothers Transportation Company. I was their terminal manager in Sioux City, Iowa, then general sales manager in Denver, Colorado, and finally ended up as general manager of their perishable division out of Omaha, Nebraska.

Q What did Watson Brothers do?

A At the time I left their employ, they were the third largest common carrier of general commodities in the United States.

Q What type of equipment did they use?

A Semi-trailers.

Q Were they refrigerated, some of them?

A Yes. The division I was general manager of was all refrigerated equipment.

Q Where did they operate, geographically?

A Primarily Chicago to the West Coast, intermediate points in Colorado and Nebraska, Iowa, Kansas, New Mexico, Arizona, California.

Q What were your duties as a general manager and so forth, what would you do specifically?

A I had to see that the equipment was -- primarily it was a job of operating the equipment, seeing that the drivers were properly instructed as to the operation of the ThermoKing units, the refrigeration equipment, the proper loading of the equipment and the care of the cargo while the equipment was moving across the country.

Q Were you familiar with the actual workings and mechanisms and so forth of the ThermoKing equipment in the trailer trucks?

A Generally -- I am not a mechanic, but generally.

Q Continue.

A Following that I became vice president of the operations of the New York Central Transport Company which was a wholly owned subsidiary of the New York Central Railroad.

Q What did that enterprise consist of doing?

A It was the first time that the New York Central had decided to get into the trucking end of the business.

Their competition at that time was in the piggyback business. The New York Central could not be in the piggyback business per se.

Q Why not?

A Because of the clearances of their overheads, their tunnels and their bridges. Therefore they had to get into the motor carrier business if they could possibly do so to compete with other railroads.

So the New York Central Railroad decided to start the New York Central Transport Company and it was a stipulation of the New York Central Railroad that no one would be employed in the New York Central Transport Company that was or had been an employee of the railroad; that they must all be experienced in the trucking business.

I was Vice President of Operations and you can well understand covering 13 states was quite an undertaking and operating tractors, working out mail runs and express -- because the railroads were trying to take the head-in cars off of their passenger trains so they could eliminate their passenger service to some extent, and that is where the motor carrier end of their company would come into it, to take care of the mail and express, then to try and eliminate the LCL cars.

Q What are they?

A Railroad LCL cars to the various stations. We set up various key points and between the key points the trucks could handle the LCL freight instead of the railroad cars.

Q Go ahead.

A I handled the labor, the mechanical, the setting up of the terminals and so forth.

Q Did you have any supervision over any of the equipment?

A Yes, sir.

Q All of it?

A All of it. All of it to the extent the maintenance people worked under a maintenance supervisor.

Q You were vice president of operations?

A Yes.

Q Were you familiar at the time with the costs involved in all this equipment?

A Oh, yes.

Q Was that part of your job, to be familiar with that?

A Yes, in the purchasing end of the equipment.

Q How about the selling end of the used equipment?

A Generally speaking, in the selling end of it,

you traded it in, so to speak, with the manufacturer when you bought new equipment so you determined the value of the used equipment at that time.

Q Was that part of your job, too?

A Yes. I was part of the council that did that, the committee.

Q This work continued for how long?

A Until 1966. From 1956 to 1966.

Q At that time what happened? What did you do then?

A Shortly after that, in 1967, I founded the Uniflex Container Corporation.

Q Excuse me. I would like to show you a picture and ask you if this is the type of equipment or some of the type of equipment you worked with, with the New York Central Railroad.

A Yes.

Q What is that?

A It is a Flexivan, bogie, tractors and rail cars. Flexivan box.

MR. PRATT: I would like to offer that as Plaintiff's Exhibit 11.

MR. CANTOR: I don't understand what relevance it has. There has been no representation as yet it has

anything to do with the equipment that we are dealing with here and unless it is offered for that --

THE COURT: I supppose it must be reasonably similar equipment, is that true, Mr. Pratt?

MR. PRATT: Yes. What I am trying to do is qualify the witness as to his depth of expertise not only in trucking but with the Flexivan equipment.

MR. CANTOR: I have not heard the witness say it is similar.

MR. PRATT: I have not asked.

MR. CANTOR: That is why there is no foundation.

THE COURT: Is the witness going to say that this equipment in the picture is similar to that which he is called upon to evaluate?

MR. PRATT: I will ask him that.

THE COURT: Why don't you do that first?

Q Mr. Henkels, is this equipment similar in any way to the equipment which is at issue here in this case?

A Yes, sir. It is the same equipment. This particular picture is a picture of dry box containers and not refrigerated containers. The bogie is the same and everything else is the same. That is Flexivan equipment.

MR. CANTOR: Your Honor, could I have a brief voir dire on the exhibit after I talk to our expert?

THE COURT: Surely.

xx (Plaintiff's Exhibit 11 marked for identification)

MR. CANTOR: Just a brief voir dire, if your Honor please.

VOIR DIRE EXAMINATION

BY MR. CANTOR:

Q Mr. Henkels, do you know what type of equipment is involved in the so-called Seatrain lease, the lease that we are here about?

A I checked the specifications that were attached to the lease.

Q Could you tell us what type of equipment it is?

A The lease shows that it is Flexivan type of equipment Mark 3.

Q Do you know whether it is Flexivan trailers or Flexivan containers?

A Flexivan containers. There is no such thing as a Flexivan trailer per se.

Q I don't want to get into a semantic dispute but isn't there a difference depending upon whether the bogies are fixed to the container or not as to whether that equipment is considered trailers or containers?

A Generally speaking, no. It is called Flexivan

and you can weld the bogie to the box and then it has to be a semi-trailer, so to speak.

Q Isn't there a difference, sir, in the weight between the various types of containers, as you referred to them being manufactured or manufactured under the license from Flexivan?

A The weight of the box of a Flexivan, generally speaking, is the same. If you have a Flexivan reefer, the weight remains the same.

Q There is no difference in Flexivans as far as the weight is concerned?

A Unless you get into a dry box.

A Flexivan reefer as such will weigh just about the same as any other Flexivan reefer. However, if you have a different type of floor in it or you have meat rails in it, it may add to the weight.

Q Is there any difference in height among the various Flexivans?

A Yes.

Q Do you know what the height specifications were of the trailers?

A Yes. This was an overall 13 foot high, if I recall.

Q This one here?

A No, the one that is in your lease.

Q It is 13 feet?

A As I believe, if I read it correctly. It is in the lease.

Q Would 12 feet be more accurate?

A No.

Q Weren't they in fact cut-down containers, do you know, the ones involved?

A Cut down?

Q The height cut down?

A I don't believe so, not according to the specifications in the lease.

MR. PRATT: Your Honor, we are getting into cross.

MR. CANTOR: I just want to establish the similarity.

Q Are these 13 feet containers or 12 feet?

A We had 12 foot, 6 and 13.

Q I am talking about these, the ones in the picture, are these 13 feet?

A These in the picture could be 12-1/2. I think they are 12-1/2.

MR. CANTOR: Judge, I guess I have no objection to your taking the picture for whatever it is worth.

We do not concede it is similar equipment, however.

MR. PRATT: Your Honor, what I am trying to do -- I have not even had this witness look at the lease with any particularity right now. I am trying to qualify him as knowledgeable in his field and I will object to any further voir dire examination.

THE COURT: You don't have to. It has come to an end.

MR. CANTOR: Yes, and let me say if the gentle man has not even looked at the lease and does not know what the equipment is involved here, I don't quite understand how he is going to give expert textimony.

THE COURT: The witness says he has looked at the specifications.

MR. PRATT: I have not had him look at it here and trying to memorize it and these questions about 12 foot, 6 or 13, are nitpicking.

I have had him look at the lease before, your Honor. He has looked at the lease. I am just trying to qualify him as an expert in the field of Flexivans, bogies, et cetera, and I want to make everybody sure what the experience of Mr. Henkels is, that he has been in it, et cetera, et cetera.

Down to the particularity of the equipment, the bogies, gen sets, whatnot, I am prepared to go into that down to the last nail when I put it in, but I would like an orderly presentation of my expert witness.

MR. CANTOR: If the inference is I have been interrupting, I would take exception. I was having voir dire on an exhibit. I was trying to establish it wasn't so similar. Had the exhibit not been offered, I would not have looked for a voir dire on the gentleman's qualifications.

MR. PRATT: At any rate, I would like to offer it in evidence.

THE COURT: Do you have any objection?

MR. CANTOR: Subject only to there being no no concession on our part it is similar equipment.

xx (Plaintiff's Exhibit 11 received in evidence)

THE COURT: How long is one of these bogies?

THE WITNESS: The bogie is about 10 foot on the top of the frame. The bogie is the four wheeled piece of equipment that is there by itself. The box is 35 or 40 feet long.

BY MR. PRATT:

Q To continue with the chronology, I think we

left it off in 1966. You had been an operational vice president of the New York Central's Trucking Corporation and I think we left at right about that.

Why don't we continue after that?

A In 1967 I founded Uniflex Container Corporation.

Q Would you please describe the circumstances surrounding that?

A It was a company formed to lease equipment, intermodal equipment, to the steamship lines, lease and rent. Short term contracts as well as long term contracts. I incorporated in January 1967 and received my first piece of equipment in May of 1967.

Q What was that?

A That was a 20-foot frame and bogie along with a 20-foot box.

Q What were the makes on those?

A Fruehauf.

Q Intermodal is again what?

A It means that this type of equipment is interchangeable to steamship lines, to railroads and to motor carriers.

Q What are the components for this type of equipment, generally?

A At the present time --

Q As it was in 1967.

A Which are you talking about?

Q I am trying to break down the equipment into exactly what it consisted of: trailer trucks, bogies, containers.

A If you are talking about the Flexivan when I was with the New York Central, the equipment consisted of boxes, bogies, semi-trailers and rail cars.

Q Did New York Central use Flexivan equipment?

A Yes. The New York Central Transport Company, the president of the New York Central Transport Company is the original inventor of the Flexivan system, and I was with him on this particular situation.

It was a matter, as I told you about the New York Central being competitive with the other railroads. They could not be competitive in the piggyback business. Therefore they had to figure out a system whereby they could operate containers, so to speak, trailers, through their tunnels and their bridges. This meant inventing a system whereby you would not have to carry the wheels on the freight car making it higher than just if you carried the box, so the Flexivan system was invented in order to make the New York Central competitive in the piggyback business.

Q What was the Flexivan system?

A It was a box on which it could be slid onto a turntable, a rail car from the bogie that carried it on the highway or the streets.

Q Then it left the bogie?

A Yes. The bogie never left the terminal.

Q Continuing on to your Uniflex, what type of operation was that?

A That was a different type of equipment. By that time the ISO, they had come into the picture. That was an organization that dictates the exact measurements of all containers throughout the entire world, including behind the Iron Curtain, so any container built today comes within the specifications of the ISO regulations.

Q What happened then?

A Then --

Q Excuse me. Because of the ISO, how did that affect your operation or what did you use or build?

A I used that type of a container which is not similar to a Flexivan at all and you used a frame and bogie at that time, we called it, which was one of these bogies but it was a frame that the box sat on so you didn't have to carry the running lights, the fifth wheel pin and the track angles in order to hold the bogie. You didn't have to

have any of that on the box. You had that on the frame and bogie and that is the way you transported it on the road.

Since then it has been refined to the point where we have what is now called chassis, the wheels are fixed to a frame and the box is tied onto that through corner castings at the four corners.

Q Continuing with your business experience narrative, you were Uniflex and they leased equipment?

A Yes.

Q What type of equipment?

A It was new when we started but as soon as the lease was up, of course it was used going to the next lessee.

Q Were you responsible in your company for the purchase of the new equipment and the trading in or sale of the old equipment?

A Yes.

Q Were you familiar with the values involved with all of that?

A Yes.

Q Did those values include containers, bogies, generator sets and Thermo King?

A Not when I was in Flexivan.

Q Uniflex.

A Not when I was in Uniflex.

Q What did that involve?

A Uniflex involved just the boxes and the chassis. That is all we leased at that time.

Q Continue with your work history.

A I was president of that company until I resigned in 1973.

Q What happened to that company?

A It is owned by Flexivan Corporation which is a corporation on the New York Stock Exchange.

Q When did that purchase take place?

A I believe it was 1967.

Q So in 1967 your corporation was purchased by Flexivan?

A That is right. Actually it started out as a joint venture between Flexivan and Universal Consolidated Industries, then Flexivan bought Universal Consolidated Industries out shortly thereafter and it became a wholly owned operation of Flexivan.

Q And that brings us right up to date, doesn't it?

A Since 1973 I have been in the used business of buying and selling containers and chassis and refrigerated units and gen sets.

Q Of all types?

A Yes.

Q I am going to show you Plaintiff's Exhibit 1, which is an equipment lease between Fruehauf Corporation, Strick Division and Seatrain Lines,and I will ask you to just read the designation on page 1 of the type of equipment, just read it thoroughly.

A No. 1 is 88 new Strick --

Q I just want you to read to yourself, so you will have read it, then when you are finished with that, let me have it back and I will ask you some questions.

A All right.

Q I also want you to read Paragraph 4 on page 3 which describes where this equipment leased will be used from.

A All right.

Q I know we have gone over this but I just want it for the record that you have seen it, you have read it.

In this lease that has already been in the record, there are specifications regarding this particular equpment that has been leased and I would ask you, please, at this time, to read those specifications.

Also, Mr. Henkels, there were two amendments to the lease, and I would like you to read those, too. Then

I will ask you questions about that type of equipment.

THE COURT: Has the witness already read these?

MR. PRATT: Yes, but I want to make sure he has them absolutely fresh in his mind right now so I can ask him some questions about it, your Honor.

For the record, those amendments are Plaintiff's Exhibits 2 and 3.

A I have read it.

Q Mr. Henkels, you have seen this lease before, you and I talked about this and so forth, and you have read it?

A Yes.

Q Just read the paragraph 5 on page 3 to the end and it deals with returning the equipment, wear and tear excepted.

A I have read it.

Q In our discussions that we have had with you, we have agreed to pay you a fee, the plaintiff Fruehauf Corporation, is that correct?

A Yes.

Q What is the amount of that fee?

A $1000.

Q You have read the specifications of this equipment

and let me ask you this: Are you familiar with this type of equipment?

A Yes, sir.

Q Do you know precisely what this equipment is?

A Yes. From the specifications, yes.

Q Would you just describe what it is, please, for the Court?

A The box is a heavily insulated box with refrigeration machinery, nose-mounted, and recessed in the nose of a 40-foot unit. This type of equipment mounted in the nose is only the electrical part of the refrigeration machinery which must have an outside source to operate the refrigeration unit, either a 220-230 line from the outside or a generating set that would make the power to operate the machinery.

The bogie is a standard Flexivan bogie that was used for many years. The generating sets, of course, are standard type, which in this particular case is a diesel-powered engine to generate 230 electricity when the container itself was not available to a direct electrical line.

In other words, when it was going down the road, in order to keep the refrigeration machinery running, you had to have a power source. From the power source was

this generator set attached to the unit as it ran down the road and it then gave the power. When the unit was in the terminal -- most steamship lines had a regular line of 230 outlets for refrigeration machinery -- when it is on the ship, they use the ship's power to run the refrigeration machine.

Q Have you seen similar equipment?

A Yes.

Q Using the word with precision, "similar bogies, similar containers and gen sets"?

A Yes.

Q And you have testified that you dealt in used equipment, so on and so forth, in your various jobs with the New York Central up to now?

A Yes.

Q Have you ever bought and sold this type of equipment?

A I have bought and sold this type in the last two years in the business of CBA International.

Q Are you familiar with the values that would attach to this type of equipment?

A Yes.

Q The lease is December 1964 and terminated in December of 1972. Would you be familiar with what the value of this equipment would be worth in, let's say,

December of 1972 and January 1973?

A Yes, I would be.

Q What would this equipment in your opinion be used for, this leased equipment? What would they do with it?

MR. CANTOR: Can we specify, are we talking about the beginning of the lease or after the lease has ended?

Q After this lease was entered into, and I don't want to belabor it, what would this generally be useful for? Why would Seatrain Lines want the stuff?

A To keep perishable cargo.

You mean after the end of the lease?

Q When they first leased it, what would be the purpose of the usage, to ship it around the country?

A To pick up perishable cargo and carry it from point of origin to point of destination.

Q And this would involve shipping it, putting it on containerships?

A Let's take an example. I am sure they handled meat from the Middle West and your packing houses are in the Middle West, Chicago, Omaha, Kansas City, Minneapolis. Some of them have hanging meat rails, so they would be carrying carcasses of beef in some of those, or lamb, depending

how many meat rails they had, which I can't tell what they actually handled, but generally this is what was handled on refrigerated equipment of this type, and it would be picked up directly at the packing house and the door sealed and carried over the road.

Q Was the gen set working at that time?

A Yes. The packing house will not load your equipment until you have it pretty cold to a certain degree, 45, 50, depending what the packing house requirements are at that time. That is always a requirement for the loading of perishable cargo.

They would load this, then transport it over the road on the bogies to their terminal where the ship departs from and as soon as they arrive in the terminal, no doubt they hooked it up to an electric line because generally speaking gen sets with 40 generator sets and 100 pieces of equipment, they would probably assign that to another piece of equipment soon after it returned. But then the equipment would be loaded on the ship and again it would be plugged into the ship's electrical outlets and carried to Puerto Rico.

In Puerto Rico it would be unloaded from the ship, put on bogies, then delivered to the customer.

However, in this particular case, in the way

Seatrain operated, and I believe,because I watched their operation in their Edgewater Terminal,and I watched them operate.

Q You were actually over there?

A Yes. They were carrying rail cars as well as semi-trailers and they used those units as semi-trailers and not as containers when they shipped these to Puerto Rico.

Q When was this?

A About the time they would have this equipment and they carried them as trailers at that time. In fact, they carried semi-trailers as well as rail cars. That is where the name Seatrain came from. They actually carried railroad cars. That was from New York to San Juan.

Q I just wanted to know if you were generally familiar with the operation of leased equipment.

The lease states, Mr. Henkels, as you read, that the equipment should come back in good repair, operating condition and certain repairs should be made.

You are familiar with that lease language?

A Yes.

MR.CANTOR: Your Honor, there is precise language in here that has certain exceptions for normal wear and tear and I don't think there is a proper predicate in the way

the question was asked.

MR. PRATT: I will restate the question.

Q The lease which is Plaintiff's Exhibit 1 states in pertinent part as follows: "Lessee agrees at lessee's sole cost and expense to keep said equipment at all times during the life of this agreement in good repair and operative condition and free of any and all liens and encumbrances except as they occur in the ordinary course of business and not due or delinquent and to replace with new parts any badly worn or broken parts not limited to tires and tubes and lessee agrees upon termination of this agreement by expiration, cancellation or otherwise, lessee shall return said equipment to lessor at lessor's address herein above stated at lessee's expense in the same state and condition at the time of delivery to lessee hereunder ordinary wear and tear excepted."

There is more but I will not read it.

Assuming -- do you understand what that means?

A Yes.

Q Assuming that at the expiration of the lease equipment specified in the lease was in the condition called for in the lease; can you place a dollar valuation on that equipment?

A Yes.

Q Let's take it on a per item value. What would

the containers be worth in your professional opinion, apiece?

A $2000.

THE COURT: This is when they would have been returned at the end of 1972?

MR. PRATT: Yes, your Honor.

Q We are talking about when this equipment would have been returned at the expiration of the lease.

What would the boxes be worth apiece?

A About $2000.

Q Per box?

A Yes.

Q What would the bogies be worth in your estimation?

A About $1000.

Q How about the generator sets, what would they be worth apiece?

A Well, I would say on those, about $1500 apiece.

MR. PRATT: No further questions.

MR. CANTOR: Your Honor, I would like to start cross-examination this morning. There are a few points I would like to cover, but I would like an opportunity to defer part of my cross-examination until I have had a chance to speak more cogently with Mr. Henkels.

THE COURT: Certainly.

CROSS-EXAMINATION

BY MR. CANTOR:

Q Mr. Henkels, when were you first contacted by anyone from the plaintiff with respect to this litigation?

A Last week.

Q By whom were you contacted?

A By Mr. Pratt.

Q Have you ever spoken to anyone from the plaintiff other than the attorneys for the plaintiff about what your testimony was going to be?

A No, sir, with the exception of Mr. Silverstein.

Q But he is an accountant?

A Yes.

Q What I am asking is, have you ever spoken to any one of the plaintiff with respect to valuation of used trailers from Fruehauf?

A No.

Q Never talked to Clark Abbott?

A No.

Q Do you know he gave a deposition in this case about valuation?

A I just heard that.

Q When did you hear that?

A Yesterday.

Q Did you read the deposition?

A No.

Q Didn't you think that would be important if you were going to give testimony on valuation to see what the Fruehauf people had to say about valuation?

A No.

Q Do you know Mr. Hadley of Fruehauf?

A No, I don't.

Q Do you know that he gave a deposition in this case on the question of valuation?

A No.

Q You have never been informed of that?

A No.

Q So you have never read his deposition, I take it?

A No.

Q Have you ever been told what the plaintiff originally sued for in this case?

A No.

Q Would it affect your opinion any to know that the original lawsuit was for $100,000 for all of this equipment; would that affect your opinion any if you had been told that?

A No.

Q Would it affect your opinion any if you had been told that in 1972 the general counsel of Fruehauf told the president of Fruehauf that the equipment was worth $100,000? Would that affect your opinion any?

A No.

Q It would not affect your opinion?

A No.

Q Would it affect your opinion any if I told you Mr. Clark Abbot who is the National Director of Used Trailer Sales for Fruehauf wrote a memorandum in 1967 in which he said the equipment, the market value of the equipment at the expiration of the lease would be $102,000; would that affect your testimony?

A No.

Q It would have no effect at all?

A No.

Q Would you have been interested in knowing these facts before you got on the stand to testify?

A Not particularly.

MR. CANTOR: Judge, I will defer the rest of it.

THE COURT: We will suspend the testimony of this witness.

Mr. Henkels, you will be available to return

on Monday?

THE WITNESS: Yes.

MR.CANTOR: Perhaps Mr. Henkels can give us his telephone number so we can reach him tomorrow and perhaps go over these things in a little more detail.

THE COURT: I will leave it to you and Mr. Pratt to make the arrangements and, of course, Mr. Pratt will be in touch with Mr. Henkels and will work out whatever is mutually convenient.

MR. PRATT: Certainly, your Honor.

(Witness temporarily excused)

MR. PRATT: Your Honor, I don't want to take Mr. Henkels' time sitting here listening to the case. May we take a recess now?

THE COURT: We will take a recess now and you can make these arrangements and let me know when you are ready to resume.

(Recess)

MR. PRATT: Your Honor, the plaintiff rests.

MR. CANTOR: I would have a motion under Rule 41(b) which is to dismiss the complaint for failure of proof and if I can just briefly address myself to that:

Defendants' position is, if your Honor analyzes

Plaintiff's Exhibit 4, which is the purchase agreement itself and Defendant's Exhibit E, which is the approved balance sheet under the purchase agreement, it is obvious in two respects that leased trailers, which everyone concedes is what the Seatrain situation was, were sold by the purchase agreement.

Paragraph 2(a) of Plaintiff's Exhibit 4 provides in two places -- first it says the category of assets specified below, and the category of assets is defined in Defendant's Exhibit E to include equipment leased to others and Mr. Silverstein testified that at least certain leased trailers were covered by the purchase agreement and I think Mr. Rushmer finally admitted that as well.

That is one place in which leased trailers is covered and if your Honor looks at 2(a) of the agreement, it is all of the assets under the categories and one of the categories is leased trailers.

The second place it is covered is the catchall language at the end which says"moveable equipment wherever located used in the operation of the business, whether or not given a specific carrying value on the balance sheet."

Our position is, the equipment was covered in that catchall language, if indeed it wasn't covered, which we submit it was, in the language I have mentioned before.

Your Honor, let me just put one further fact in context: Your Honor heard yesterday the language of the Court of Appeals as to what assets were to be divested and it was in the broadest possible terms, and there was some discussion as to the origin of that language, and I mentioned I would be asking your Honor to take judicial notice of the FTC decision and order which was the kick-off for this.

I have now a copy --

THE COURT: Apparently that language was drafted by counsel of the FTC, wasn't it?

MR. CANTOR: Correct, your Honor, and emanated directly from the final order of the FTC which was issued on May 28, 1965, prior to the negotiations that were involved here.

The citation is 67 FTC 878 and if your Honor jumps over to page 939-- I can hand up a copy or just read it -- the jump cite is 939 and it says, "Respondent Fruehauf Trailer Company, a corporation and its officers, directors, agents, representatives and employees shall, within one year from the date that this order becomes final, divest itself absolutely in good faith of all assets of its Strick Trailer Division and such other assets as may be necessary to restore the Strick Trailer Company and

Strick Plastics Corporation as a going concern and effective competitor in all lines of commerce in which it was engaged immediately prior to its acquisition by respondent."

"As used in this order, 'assets' shall include any properties, rights and privileges, tangible and intangible, including but not limited to plants, machinery, equipment, contract rights, patents, licenses, trade names, trademarks and goodwill of what ever description."

That is where the language came from and it was written by Commissioner Elman and his colleagues back in May of 1965 and was in everyone's mind.

It is inconceivable to think it would not have been during these negotiations.

Our position is that the FTC ordered that all assets be divested. The purchase agreement complied with that order. The Court of Appeals ratified that settlement using the same language and in light of that, I respectfully submit there is no issue before your Honor and the complaint ought to be dismissed.

THE COURT: The Court reserves decision on your motion.

MR. CANTOR: Thank you.

Let me hand up a printed copy of the FTC

decision.

MR. PRATT: Your Honor, I would like to respond to the motion but for the expedition of the trial, I can save my remarks.

THE COURT: Yes. I don't think it is necessary.

MR. CANTOR: Martin Bachman.

M A R T I N B A C H M A N, called as a witness by the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CANTOR:

Q Mr. Bachman, by whom are you employed?

A I am employed by Strick Corporation.

Q In what capacity?

A As vice president- finance, and as a director.

Q Do you also have a position with the parent company of Strick Corporation?

A Yes. I am the president of the parent company of Strick Corporation known as Distribution International Corporation.

Q Could you give us, Mr. Bachman, and you might do it in a narrative form, starting with your educational background, your professional training and bring us up to

date without a great deal of detail in what you have been doing for the last 25 years.

A I am a graduate of the Wharton School, a Certified Public Accountant, State of Pennsylvania.

In 1950, late 1950, I was employed by the Strick Company, a manufacturer of trailers, as the controller of its Chicago plant.

In 1953,I became the manager of that plant.

Q This was prior to the acquisition of Strick by Fruehauf, is that correct?

A Yes. This was prior to the acquisition.

Upon the acquisition of Strick by Fruehauf on January 1, 1956, I became the controller of the Strick Division of the Fruehauf Corporation and I remained in that job until the end of 1965.

As of the 1st of January, 1966, when a newly formed Strick Corporation purchased all of the assets of the Strick Division, pursuant to the Federal Trade Commission order from Fruehauf, I became vice president-finance of Strick Corporation, and remained in that capacity until now.

Q Can you tell us, sir, during the period 1956 until 1966, Strick operated as a division of Fruehauf Corporation, is that correct?

A That is correct.

Q Can you give us in your own words the manner in which it so operated and what I am getting at is, was it dependent on Fruehauf, independent of Fruehauf? How did it operate as a business?

A Strick Corporation operated independently in every respect except two.

Q The Strick Division, you mean?

A Yes, I am sorry. The Strick Division had its own design, engineering department, its own manufacturing plants, its own sales department, its own administrative group, its own accounting department.

Every function necessary to operate the business was operated within the Strick Division.

It went to the Fruehauf Corporation for two reasons: (1) to receive working capital to draw funds; secondly, to utilize the facilities of the Fruehauf Finance Company to sell its paper. Otherwise, it operated separately and distinctly and, as a matter of fact, the Strick Division was in direct competition with the Fruehauf Division which was also manufacturing and selling trailers and in direct competition with Strick, as I said.

Q Let's get for a moment to the Fruehauf Finance Company, and I think you mentioned that the Strick Division had various transactions with the Fruehauf Finance Company,

is that correct?

A That is correct.

Q Why don't you tell me the various types of transactions that the Finance Company would have with the Strick Division and your understanding, at least back at that time as the controller of the Strick Division, of what the ramifications were of each of the various categories of transactions that there might be?

A There were two basic categories of transactions. One was the conditional sales contract category and the other leases. The conditional sale, of course, arose when the Strick Division manufactured and sold equipment to a customer and financed the purchase of that equipment for the customer by means of a conditional sales contract under which the customer would pay usually monthly payments over a period of time.

The Strick Division would sell that conditional sales contract to the Fruehauf Finance Company and receive credit for the proceeds.

The other category --

Q Let me stop you there. In a conditional sales agreement, the equipment itself was actually sold to the customer, is that correct?

A That is correct.

Q Assuming compliance by the customer with the terms of the sales agreement, namely, that he paid when he was supposed to, the customer would end up with the equipment?

A That is correct.

Q The Strick Division would not get the equipment back?

A No.

Q Nor would anyone else from Fruehauf?

A Exactly right.

Q Now you were going to tell us about lease arrangements.

A The second category were leases. Under the lease arrangements, the Strick Division retained title and gave up possession of the equipment to the lessee for a specified period of time, at the end of which time the lessee would have the obligation of returning that equipment to the Strick Division.

Q Vis-a-vis the Finance Company, how was a lease situation treated as opposed to a conditional sales agreement?

A The lease instrument itself called for rentals over a period of time. The right to those rentals was sold by the Strick Division to the Fruehauf Finance Company, and

I emphasize the right to the rentals only, not to the equipment.

Q At least as far as your understanding goes, title to the equipment stayed within the Strick Division of Fruehauf and did not pass to the Finance Company?

A That is correct.

Q Now, sir, you are familiar, I take it, with Plaintiff's Exhibit 1 through 3, which is the lease and the two amendments that we are here in court about?

A Yes, I have seen them.

Q Sir, if you take a look at Plaintiff's Exhibit 1, could you tell us, sir, first, if you know, who negotiated that lease with Seatrain?

A I did.

Q To your knowledge, sir, who designed the type of equipment and in particular the containers that are covered by that lease?

A The Strick Division engineering department.

Q Was that a different design than other equipment that other divisions of the Fruehauf Corporation might sell?

A Yes.

Q Would it be fair to say, sir, that was uniquely a Strick design?

A Yes, it was.

Q Sir, let's get a little bit more directly now to the purchase agreement and what this dispute is all about.

Let me ask you, were you present at the negotiations that led up to the execution of a purchase agreement?

A Yes.

Q Let me give you a copy of Plaintiff's Exhibit 4. I will probably have some questions about it as we go along.

Could you characterize your participation in the negotiations? Were you present at all of them, some of them, none of them, or few of them?

A I was present at all of the negotiations that took place at the Fruehauf Company's offices in Detroit.

I don't know of any meeting that I missed.

Q And that would include the so-called global meetings, as well as those at which the nitty-gritty of the agreement was hammered out?

A Along with Mr. Katz, I spoke with Mr. Grace at the so-called global discussions.

Q Sir, do you remember approximately when those negotiations commenced?

A Late in 1965.

Q At that time, sir, were you aware of the Federal Trade Commission decision that you just heard me read a portion of to his Honor?

A Very much so. As a matter of fact, the Federal Trade Commission order triggered the negotiations to begin with.

Q I will paraphrase it, with respect to what assets were to be divested.

Were you aware of it?

A We were not only aware of it, but all the negotiations that took place took place with that language in front of us practically all the time.

Q To your knowledge, sir, were the Fruehauf people across the table from you also aware of that language?

A Yes.

Q Was it your understanding at the time that the negotiations were an attempt, assuming the proper price could be reached, to comply with that order?

A That is right.

Q In addition to Plaintiff's Exhibit 4, let me show you Defendant's Exhibit E which is the approved balance sheet by Touche Ross and let me direct your attention first to Paragraph 2(a) of Plaintiff's Exhibit 4, and in conjunction

with that-- that runs from page 3 to page 5, and in conjunction with that, page 3 of Defendant's Exhibit E, which is the actual balance sheet, and with those two documents in front of you, sir, can you tell us what your understanding was as to whether or not the residual of the equipment covered by the Seatrain lease was covered by those two documents?

A Paragraph 2 was written for the purpose of identifying the categories of assets that were being sold to the Strick Corporation.

It referred to the balance sheet of the Strick Division at the time to identify these categories. One of the categories listed here in Paragraph 2(a) is property, plant and equipment, net of accumulated depreciation. That category included equipment on lease to others.

The statement of assets and liabilities as prepared by Touche Ross shows a category Equipment Leased to Others less Accumulated Depreciation, which is in keeping with the provisions of Paragraph 2(a).

Q Let me just interrupt you right there to get your understanding.

Was it your understanding, sir, at the time, that the residual of the equipment under the Seatrain lease was covered by the category, "Equipment Leased to Others?"

A It was our understanding that all leases, whether the equipment under lease was shown with a dollar value on it on the balance sheet or not, were included in the sale. As a matter of fact, we went on to provide other language in this agreement to be certain that that wasn't overlooked.

Now, the Seatrain lease itself was not mentioned as such, but the category of leased equipment which had no balance sheet value was mentioned in the course of negotiations.

Q Incidentally, I take it the reason the Seatrain lease had no dollar value at that time is because the rental payments had been sold to Fruehauf Finance, is that correct?

A Yes, and for another reason.

Q Can you tell us the other reason?

A The other reason was because of Fruehauf's accounting policy. The accounting policy at that time was to record on the books and records of the company leases in two manners. The first one concerned leases which provided that rentals be paid, the total of which, after deducting interest charges, was more than 90% of the cash selling price of the equipment. That type of transaction was called for to be recorded on the books of the company as a sale.

The effect of that recording was that there was no record of any kind on the balance sheet when that recording as a sale was completed.

Q But your understanding was that the instrument itself with Seatrain remained as a lease?

A The instrument was not changed. It was a lease and it was handled as a lease for purposes other than the recording of the transaction I just described.

Q I think you started to tell us, looking at paragraph 2(a) of the document that one place, in your understanding at least, that the Seatrain situation was covered, is property, plant and equipment, and specifically the breakout for equipment leased to others; is that correct?

A That's correct.

Q Is there any other place in paragraph 2(a) to your understanding where the Seatrain situation would have been picked up?

A Yes.

Q Could you tell us what that is?

A Paragraph 2(a) also states that all moveable equipment, wherever located, used in the operations of the Strick Division, whether or not expensed or charged off or for other reasons not given a carrying value on the

comparative balance sheet or the approved balance sheet, is included in this sale.

Q You have told us your understanding that Seatrain was covered under that as well, correct?

A Right.

Q Can you tell us, if you recollect, the discussions that culminated in the placing of that language that you have just read into the final agreement which is Plaintiff's Exhibit 4?

A There was a general discussion during negotiations to provide some sort of language that would pick up assets that were not on the balance sheet.

We then went on to identify and put into words that concept. We discussed certain types of assets that would be in that category. One of them was tools and equipment that were being used in the plants, the manufacturing plants or furniture, fixtures, office equipment, which may have been written off the books by virtue of the fact they were fully depreciated on the accounting records and therefore were to have no book value.

Those were to be included and it was understood and therefore we mentioned not only were the assets that appear on the balance sheet included, but any assets which would normally have fallen within the described groups,

even though they had no balance sheet value, would be included in the sale.

We then discussed what other assets might be included. Mobile equipment, which we used in the course of the business and leased trailers were in those categories where we had no possession. The words "moveable equipment, wherever located," was meant to cover trailers which were in the hands of others, of course, wherever they may have been, and which we, of course, had no possession of at that time.

This language was designed to take care of the situation that we are bothering over here.

Q To your recollection, was that language explicitly discussed during the negotiations?

A The language was specifically discussed. There was not a long period of time devoted to discussion of leased equipment. It was in context with all of the other discussions of other assets. We had no idea at the time there would be any problem with it, therefore we spent what we felt to be a reasonable time on it.

Q Sir, the context again, just so we can set it out-- let me withdraw that and ask whether that language, the moveable equipment wherever located, whether or not given a carrying value, whether that was an attempt to draft

catchall language to comply with the FTC order that all assets be divested?

A Yes, it was.

Q Let me show you two documents marked for identification at the depositions as Defendants' Exhibits AAA and Defendant's Exhibit AAB.

Let's work with AAB, first. What is this document?

A This is the contract under which Strick sold to Seatrain Lines the 98 used Flexivan refrigerated containers and 38 diesel motor generators.

MR. PRATT: I object to the use of the word "sold." I know he is using it generically.

MR. CANTOR: Purported to sell.

Your Honor, I will offer it in evidence in the same manner that Mr. Pratt offered a number of documents yesterday, without asking for his stipulation that it binds Fruehauf.

THE COURT: This is the arrangement that was finally made with regard to this equipment?

MR. CANTOR: Yes, your Honor, between Strick and Seatrain.

xx (Defendant's Exhibit AAB received in evidence)

Q Mr. Bachman, just so the record is clear, the 98 vans and 38 generators covered by AAB are equipment that was covered by the original Seatrain lease, is that correct?

A Yes, that is the same equipment.

Q Sir, you are not an expert at valuation, I take it?

A I am not.

Q Can you tell us, however, whether, to your knowledge, the negotiations with Seatrain and the $90,000 price that was received as a result of AAB, were arm's length negotiations?

A To the best of my knowledge, the negotiations were arm's length and the price is reasonable.

Q To the best of your knowledge, was Strick trying to receive every penny it could for this equipment?

A Every penny it possibly could.

Q Would you take a look at Defendant's Exhibit AAA, if you would? Tell us what that document is.

A It is an invoice from Strick to Transport Pool selling the 100 bogies that were the subject of the Seatrain lease.

Q That rounds out the equipment, does it?

A Yes.

Q The bogies are the wheels that go under the van?

A Yes, the running gear including the wheels.

MR. CANTOR: I would offer that document in evidence.

MR. PRATT: I will object and move to strike the words "the price was reasonable" if that is any valuation.

MR. CANTOR: We are not holding Mr. Bachman out as an expert on valuation. He said to the best of his knowledge.

MR. PRATT: All right.

(Defendants' Exhibit AAA received in evidence)

Q I will ask you the same question, Mr. Bachman, about Defendants' Exhibit AAA.

To the best of your knowledge, sir, were the negotiations with Transport Pool arms-length negotiations for these bogies?

A Yes.

Q To the best of your knowledge, sir, did Strick receive every penny it felt it could receive for these 100 bogies?

A Yes.

Q Let me show you, Mr. Bachman, Defendant's Exhibits XX3 and XX4 which were marked for identification yesterday and starting with XX3, if you can tell us what these documents are.

A XX3 is a check for $277.50 and a request for the purchase of 54 Maine license plates in 1967 for the Seatrain Line bogies.

Q The same bogies covered by the original Seatrain lease?

A Yes.

Q Who was to be recorded as the owner of that equipment, sir?

A It is not stated on this exhibit but I know it to be the Strick Division. Oh, this is afterwards, this is the Strick Corporation -- I am sorry.

MR. CANTOR: I would offer that.

MR. PRATT: I object to it unless the whole file that went to Maine upon which some clerk made a decision to issue license plates to Seatrain Lines is offered with it. This is misleading. I quite frankly feel if the entire file and the story were told on how those license plates were obtained, it would go far beyond that relatively innocuous check request and voucher.

MR. CANTOR: I don't know what the gentleman

is talking about but Mr. Silverstein told us Fruehauf did nothing to secure registration on this equipment.

The documents that went in yesterday indicated that in 1964, 1965 and 1966 it was originally the Strick Division and later the Strick Trailer Corporation after the acquisition that did it.

Those are the documents that I know of that relate to 1967.

THE COURT: This is simply evidence that at this time in 1967 the Strick Corporation paid to the Secretary of the State of Maine $277.50 for license plates for 54 bogies which apparently at that time were being used by Seatrain Lines, Incorporated.

MR. PRATT: That is right.

My objection to it--

THE COURT: That does not necessarily prove ownership, it just proves that they paid the money.

MR. CANTOR: The document only says what it says, your Honor.

THE COURT: It is received for that purpose.

xx (Defendants' Exhibit XX3 received in evidence)

Q Mr. Bachman, can you tell us what XX4 is?

A It consists of three pieces of paper; one is a letter dated August 7, 1968, addressed to the Secretary of

State, Augusta, Maine, requesting seven 1968 license plates for seven bogies.

The second piece of paper are registration forms for the bogies issued by the State of Maine and the third piece of paper is a check request for the amount of $33.50 as payment for these seven license plates.

All of these bogies are identified as those under the Seatrain lease.

MR. CANTOR: I will offer it, your Honor.

MR. PRATT: Same objection if it is being offered for anything other than what it says.

MR. CANTOR: The witness just told us what it says.

THE COURT: It will be received.

xx (Defendants' Exhibit XX4 received in evidence)

Q Mr. Bachman, you were in court yesterday, were you not, when Mr. Silverstein mentioned the Milwaukee Transport situation?

A Yes.

Q Are you familiar with the Milwaukee Transport situation?

A Yes.

Q Can you tell us whether or not the Milwaukee Transport situation was comparable to the Seatrain situation?

A It was not.

Q Can you tell us in what ways it was not comparable?

A The Milwaukee Motor Transport transaction was purported to be a lease. In fact, it really was a lease with an option to buy at the expiration of the lease for a nominal sum, which was small enough so it was certain that the lessee would exercise his option, therefore it was treated as a conditional sale from the very beginning, which in reality it was.

Q In fact, sir, was there an option price includable in the payments made by Milwaukee Transport?

A There was an option price designated to be paid and the Strick Division was, upon sale of this instrument by the Strick Division to the Fruehauf Finance Company, the Strick Division was paid not only for the rental payment, but also for the option price.

Q You heard Mr. Silverstein testify yesterday with respect to the Seatrain operation, the Strick Division was not paid anything for the residual?

A I would agree.

Q The Milwaukee Transport situation, what was the problem there and how was it finally resolved?

A After the Strick Corporation had bought the

assets from Fruehauf, Milwaukee Motor complained that the equipment wasn't living up to its specifications and claims.

They wrote to Strick Corporation, they notified Fruehauf, too, about that complaint. Strick bought back the contract,the Milwaukee contract, from the Fruehauf Finance Company because under the terms of the agreement of sale, of the Strick assets, Strick, the buyer, was obligated to take care of any complaints on equipment which Strick had produced prior to the sale.

Q And you are talking about Plaintiff's Exhibit 4, the purchase agreement?

A Yes.

Q And that obligated Strick - I think it is in paragraphs 3(a) and 3(b), to take care of repair and warranty work?

A Yes, Strick was obligated to do that.

Q And that is what Strick did with respect to Milwaukee Transport?

A Yes.

Q Are you aware, Mr. Bachman, of any situation that is comparable to the Seatrain situation in which the equipment was returned to Fruehauf rather than to Strick?

A I know of no such situation.

MR. CANTOR: Nothing further.

THE COURT: Mr. Bachman, you testified it was the Fruehauf financial policy, if the payments under a lease were to amount to more than 90% of the value, then it was recorded as a sale?

THE WITNESS: Yes, your Honor.

THE COURT: With respect to this particular equipment, did the payments due under the lease, were they calculated to amount to more than 90% of the value?

THE WITNESS: Yes, sir.

BY MR. CANTOR:

Q Your testimony, as I understand it, is that for the accounting purposes, pursuant to the American Institute of CPA's, the transaction could be treated for accounting purposes as a sale, is that correct?

A That is correct.

Q In what manner was the transaction treated for all other purposes?

A If the proceeds of the lease were to be less than 90%, 90% or less, then the lease would be recorded on the books and records as a lease in the following manner:

On the balance sheet the cost of the leased equipment would be set up as an asset to be depreciated month by month over the life of the lease.

The income, the revenue, the monthly payment from that lease would be taken into income each month as that was earned rather than show it as a lump sum; so the balance sheet does reflect and would reflect the value of that type of equipment until the lease is finally -- until it is fully depreciated.

Q In a so-called full payout lease, the balance sheet does not reflect the residual value of the equipment?

A That is correct.

Q What I am asking you, for all other purposes, other than for accounting purposes, did the Strick Division treat full payout leases, did they treat them as leases or sales?

A As leases.

Q And title did not pass to the purchaser?

A It did not.

Q Whereas in a conditional sales agreement, title would pass to the purchaser?

A That is correct.

Q And the purchaser would get the equipment at the conclusion of the payments?

A He would get possession immediately. He would get title immediately. We, the conditional seller, would

record a lien against the equipment in whatever manner it was prescribed and in the jurisdiction, and we would preserve that lien until we were fully paid.

At the end of that time, we would remove the lien from the title and give the free and clear title to the purchaser.

Q Again, just so we can make this as clear as possible, was it your understanding, sir, that the purchase agreement, specifically paragraph 2(a) covered all leases whether full payout or otherwise?

A Definitely, yes.

Q And it is your belief that that was understood by all concerned at the negotiations?

A I believe it was understood by everyone.

MR. CANTOR: Nothing further.

CROSS-EXAMINATION

BY MR. PRATT:

Q Mr. Bachman, you have just testified that paragraph 2(a) covered all leases, conditional sales or otherwise and you believed that was understood by everyone.

Did you believe that was understood by Mr. Silverstein?

A I don't recall that Mr. Silverstein was either there or not at the time this was discussed. Mr.Silverstein

did not attend all of the negotiating meetings.

Q Let me ask you this: Who do you include in the category of everyone, specifically?

A Everyone who attended.

Q We are looking at language in a contract that does not state anything about the Seatrain lease and you said you thought that everyone understood this residual equipment in the Seatrain lease --

MR. CANTOR: Objection. What the gentleman said was that it was his understanding that everyone knew that non-full payout and full payout leases were covered by the phrase "leased equipment." He made quite clear the Seatrain situation itself was not discussed.

THE COURT: Yes.

Q There is a distinction between what we know was not mentioned, but in order to have a binding contract, there has to be some mutuality of understanding. We are not talking about a couple of jigs and an old hi-lo in a plant. We are talking about quite a bit of equipment, at least $336,000 worth of equipment by my calculation, and I would like to know upon what you base your statement that everyone understood that all kinds of leases were covered. What is the basis of that belief?

A Mr. Pratt, Strick Corporation paid $17 million

for all of the items that were not shown as dollar values on the balance sheet. We went through a process to describe what we were buying for that $17 million and that included assets, all of the leased equipment that did not have a dollar value on the balance sheet, among other things, so we are not talking about $300,000; we are talking about a lot more.

Q I am only talking about $300,000.

You were buying things and you were setting forth categories of things that were bought. Now, it is absolutely plain and I think there is no disagreement that nowhere set forth in this contract and nowhere set forth in any schedules or lists which are comprehensive at the end of the balance sheet is the residual equipment, to wit, 100 trailer trucks and whatever bogies and gen sets mentioned, or identified, so we are dealing with a question of whether or not everybody somehow assumed that this particular equipment passed to Strick, the new Strick Trailer Corporation, at the closing, and I would like to know where is the basis for your opinion that everyone understood that. Everybody has to include somebody from Fruehauf or if it does not, I would like your testimony.

MR. CANTOR: I will object to Mr. Pratt's summation. I don't believe that is a proper question of the

witness. The witness has stated his understanding.

This is not cross-examination of that understanding. It is argument with him as to whether he is correct.

THE COURT: Yes. I think this gets us into the realm of argument.

Q I just want to clarify a couple of things.

First, was this Motor Transportation Company, the Milwaukee Motor Transportation Company lease, a full payout lease?

A Yes.

Q Was the Fruehauf-- excuse me -- was the Seatrain lease a full payout lease?

A Yes.

THE COURT: What is meant by a "full payout lease?" That you get all your money at the end?

THE WITNESS: A full payout lease is one where the rentals amounted to more than 90% of the cash selling price. That is what I characterize as full payout.

Q And that means there is no residual value of the equipment carried on the balance sheet, is that true?

A That is correct.

Q Because you have already gotten in the money?

A Because it was recorded according to the

accounting policy as a sale.

Q The accounting treatment given to this advance of cash from the lender to the borrower is as of a sale.

Just to clarify it, if the thing is worth $100 and you get $100 for it, then you don't carry $25 as a possible residual value, is that correct?

MR. CANTOR: I object to the form. It mischaracterizes the testimony.

Strick did not get $100 for $100 and Mr. Silverstein has so said. They got the rental payments but they did not get anything for the differential, the 10% differential. They got $90 for $100.

Q Even if they got $90, they decided they would not carry an asset on the balance sheet?

A Strick did not make such a decision. It was a Fruehauf Corporation policy.

Q Milwaukee and Seatrain were full payout leases?

A By the definition that I just gave, yes.

Q And you also testified that Milwaukee Motor Transport had some problem with their equipment?

A That is correct.

Q And you also testified the responsibility for that equipment post January 11, 1966 was with Fruehauf Corporation?

A With Strick Corporation.

Q I show you Plaintiff's Exhibit 7 and ask you to look at that, please, and tell me what you think it means.

A I have read it.

Q What was that all about?

A It is a letter addressed from Harry Shapiro, president of Strick Finance Company, dated April 15, 1966 to Mr. L. Cowling of the Milwaukee Motor Transport organization replying to a letter that Mr. Cowling had mailed to Sol Katz on October 7.

Q What is the substance?

A I can read the substance.

Q Was there a dispute between Milwaukee Motor Transportation and Mr. Shapiro or Mr. Katz?

A There was no dispute. I don't know what that letter of April 7th said to Mr. Katz.

Q In other words, outside of just reading it, you have no familiarity?

A I have familiarity but not with this particular piece of paper. I said that Milwaukee did have a complaint. We acknowledged that we had responsibility for that complaint, Strick Corporation, by reason of the contract we signed with Fruehauf. I don't know what else I can say

about it.

Q Do you know why Mr. Shapiro would put in his letter the sentence, "It would therefore not serve a useful purpose to have the equipment returned to Strick"?

A I think I can understand that. I think that Mr. Cowling was saying that if you don't take care of my complaint, I will stop paying and send the equipment back to you, and Harry Shapiro said "It would serve no useful purpose" which was right, it wouldn't.

Q And that was the reason for that sentence.

Why would he tack that on to this sentence?

"As you know, the Fruehauf Corporation took over all installment receivables as part of our agreement of sale and your obligation will be due to Fruehauf."

A Exactly right.The payments on account of that instrument were due to Fruehauf Finance Company and would continue to be. We, on the other hand, had the obligation to repair the trailers. It had nothing to do with the payment of the instrument.

Q That is your testmony with regard to that paragraph?

A Yes, sir.

Q You have testified, in the beginning of your testimony, as to prior to the January 11, 1966 agreement,

and correct me if I am wrong, the Fruehauf Corporation-Strick Division leased certain trailers to Seatrain Lines with which we all agreed.

Prior to January 11, 1966, who owned those trailers?

A Prior to January 11, 1966?

Q That being the date of the sale agreement.

A The Seatrain-- the leased trailers under the Seatrain lease were owned by Strick Division, Fruehauf Corporation.

Q In your mind, is there a difference in the ownership of the asset, or these particular assets, by Strick Division of Fruehauf Corporation or Fruehauf Corporation? Is there any difference in your mind?

A A great deal of difference.

Q Tell us if the ownership of the leased trailers, the bogies, was by Strick Division of Fruehauf or just Fruehauf Corporation?

MR. CANTOR: I guess Mr. Bachman can answer. He is not an attorney and he is not being asked to testify as an attorney. He stated that his understanding was they were owned by the Strick Division. He further stated that they were sold to the Strick Company by the purchase agreement.

If the cross-examination now is getting into

basic corporation law as to who owns what --

THE COURT: I will sustain the objection.

MR. PRATT: Your Honor, I would like to address myself to that.

I am not trying to elicit a legal opinion from Mr. Bachman. What I am trying to show is to cast a certain doubt on his ability to make a legal determination which apparently he has done throughout all the direct testimony as to what was sold to Strick Corporation as of the January 11, 1966 lease.

I was just trying to show that his concepts --

THE COURT: He simply testified to what his understanding was.

MR. CANTOR: Exactly.

THE COURT: The ultimate fact is one for the Court to decide.

Q During your negotiations with Fruehauf Corporation and Strick, the negotiations between Fruehauf and Strick on this sale, were you at any meetings where Mr. Rushmer and/or Mr. Silverstein were present?

A Yes.

Q Did you discuss with them specifically the Fruehauf-Seatrain Line's lease at any time?

A No.

Q Are you aware of any discussions about the Fruehauf-Seatrain Line lease during these negotiations, specifically on that lease, between anyone and anyone?

A I know of none.

Q After the sale that we are talking about on January 11, 1966, did the earnings of Strick Trailer Corporation increase over the next several years, if you know?

A Over the next several years? Yes.

Q Was any of these earnings attributable to the residual equipment in the Fruehauf-Seatrain lease?

A I don't know how to answer your question. Earnings are not attributable to residuals.

Q You did testify, though, that the FTC order required the divestiture from Fruehauf Corporation of all assets necessary to keep Strick Corporation as a going business. That was your testimony, was it not?

A Yes.

MR.PRATT: Nothing further.

MR. CANTOR: Nothing further.

(Witness excused)

MR. CANTOR: Judge, we have one more witness that will be very short, not on valuation, except peripherally. Then we have two witnesses who would testify

exclusively on valuation.

With your Honor's permission, I would prefer to defer the two so-called expert witnesses until after the conclusion of Mr. Henkels' cross-examination on Monday and what that would mean is I will probably be through in about 15 minutes.

THE COURT: All right, we will do it that way.

MR. CANTOR: Mr. Weber, please.

W I L L I A M P. W E B E R, called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CANTOR:

Q Mr. Weber, can you give us a brief summary of your work expérience and your present situation.

A I was employed by Seatrain for approximately 43 years. The last position I held prior to my retirement was vice president-administration, container division.

Q And you presently are retired?

A Presently retired. I have been retired since October of 1973.

Q Let me show you a document marked Plaintiff's Exhibit 6 in evidence and I am referring specifically to the last page which is the 8-1/2 x 11 sheet.

Let me ask you first, sir, whether your signature appears on that document.

A Yes, I signed on behalf of Seatrain.

Q Do you recall who signed on behalf of Fruehauf?

A I believe Mr. Abbott.

Q Clark Abbott?

A Yes.

Q Sir, let me ask you-- that document, by the way, is dated September 21, 1972.

At that time did Seatrain have any practice with respect to damaged equipment prior to the end of the lease? What I am getting at, if Seatrain were the lessee of certain equipment and it was damaged prior to the expiration of the lease, did Seatrain have a practice as to what it would do --

A You mean under other leases?

Q Generally.

A Yes, we had a practice with other leases on damages and payouts.

Q Can you tell us what the practice was generally?

A The practice was generally to pay for the damaged equipment the value under the contract to the party to whom you were paying the rental.

Q The party to whom you were paying the rental?

A That is correct.

Q Specifically in the Seatrain situation -- I am sorry -- in this particular lease, we have all been calling it Seatrain, but you had a lot of others, I guess.

In this particular lease, to whom was Seatrain paying the rental?

A Fruehauf.

Q Was Plaintiff's Exhibit 6 entered into pursuant to the policy that you have told us about that if equipment was damaged, you would settle up with the person to whom you were making the lease payments?

A That is correct.

Q Was there any intention, sir, on your part, on behalf of Seatrain, to indicate that Seatrain believed that Fruehauf actually owned the equipment?

A No, sir. The tenor of this was to reimburse the party to whom we were paying the rental for the equipment that was lost, damaged, and also to protect Seatrain's interest and by that time we knew there was a disagreement between the two companies.

Q And, in fact, sir, the amount that was paid was approximately $2900, is that correct?

A $2,952.74.

Q And that was for two vans and two generator sets?

A That is correct.

Q Is it also correct, sir, there were three months' rental still owing on that equipment?

A That I don't remember. It could be that any rental that was due on equipment would be paid at that time. The practice would be that when equipment was damaged, we should immediately notify the lessor or to whomever we were paying the rent that the equipment had been damaged such and such a date and rental should cease.

Q Is it your testimony that that $2900 amount did or did not include some payment for rental?

A I couldn't tell you whether it did or not.

Q You don't remember?

A No, sir, I do not. It is possible that it could.

Q Let me show you AAB in evidence.

Are you familiar generally with that document?

A Yes, sir.

Q Are you familiar generally with the equipment that is covered by that document, namely, the 98 vans and 38 diesel motor generators?

A Yes.

Q Are you familiar generally with the negotiations that culminated in the purchase price of $90,000 for that

equipment?

A I have knowledge of the negotiations and any contract of this nature would have had to pass through my department.

Q In fact, who conducted the negotiations on behalf of Seatrain?

A I would have to assume it was the engineering department, Mr. Heffernan, or Mr. Pisano, and we also had a Mr. Vickers, who was involved.

Q Sir, to the best of your knowledge, were these negotiations arms-length negotiations?

A Yes.

Q To the best of your knowledge, did Seatrain pay a fair and reasonable price of $90,000 for that equipment?

A Well, I would say that we understood it to be a fair and reasonable price under the lease.

Q Under the lease, meaning what?

A The equipment as far as our engineer was concerned was not worth $90,000 in the condition which it then existed.

MR. PRATT: I move to strike that testimony as hearsay. If they want to bring the engineer in, they can bring him in.

MR. CANTOR: He is not being held out as an expert.

THE COURT: I suppose if you actually returned the equipment, it would cost a great deal to return it.

THE WITNESS: I wouldn't say a great deal. There is a transportation charge from Seatrain to Fairless Hills, Pennsylvania.

There would be some repairs you would have to make at all times before you returned equipment.

Therefore, our engineering department's feeling would be that $90,000 would cover all these expenses, as well as the equipment.

Q Just so we are clear, and again we are saying you are not an expert, sir, but basically what you are saying is, in the condition it was in in 1972, the equipment might only have been worth $60,000 or some lesser number?

A It would be worth something less than $90,000 in the condition that it was in. Under the lease, you remember, we are required to have normal maintenance and so forth. If a generator was not running, we would probably have to fix it.

Q To fix it up and get it back and so forth plus whatever it was worth in its not pristine condition, the

total of those numbers --

A We assumed it to be worth to Strick under the contract and this is what it is.

MR. CANTOR: Nothing further.

CROSS-EXAMINATION

BY MR. PRATT:

Q You resigned from Seatrain --

A I retired. They wanted me to stay but I decided to give it up.

Q Yes, there is a difference.

You retired in 1973?

A October 1973.

Q To your knowledge, if you know, was any of the equipment under this lease we are talking about, was any of that still in service by Seatrain?

A From the files which I saw and correspondence which I saw prior to my retirement from Seatrain, there was an intent to use this in operations to Jamaica, to Puerto Rico, to the Dominican Republic for the transportation of coffee, cocoa, and things of that nature, pineapples.

THE COURT: You are referring now to the situation at the end of 1972 when the lease came to an end?

MR. PRATT: Yes.

Q Do you know, beyond the files, whether they

actually used it?

A No, I didn't check that they did but I don't think we buy anything just not to use it.

Q I don't think so either.

The other thing is, absent any involvement with this Strick Corporation's divestiture from Seatrain, what would Seatrain's normal course of events be as far as returning the equipment at the end of that lease?

MR. CANTOR: I don't understand the question. I am just asking for a clarification.

Is the question: Had there been no purchase agreement, what Seatrain would have done with the equipment?

MR. PRATT: That's the question.

A We had no purchase agreement. All we had was a lease and we tried our best to abide by the lease. The lease requires the return of the equipment to Strick Corporation. Strick Division of Fruehauf Corporation at Fairless Hills, Pennsylvania.

We offered to return the equipment to Strick at Fairless Hills, Pennsylvania in writing and I signed the letter.

Q So it was your understanding that the equipment was to be returned to the Strick Division at Fairless Hills?

A Under the contract, yes.

Q Who did you understand owned that equipment?

A Our understanding was that the equipment was owned-- well, it was originally leased from Strick Division of Fruehauf Corporation. That is our understanding. It was licensed in the name of Strick. We were advised by Strick that they owned the equipment, that it had been handled under a financial arrangement with Fruehauf through Fruehauf Finance Division and we would pay rentals to them and we did, but there was never a change in the contract that said to whom we had to return the equipment.

Fruehauf did claim that they owned the equipment and there was a dispute but it was our decision with legal advice and so forth to take the course we followed.

Q When you say contract, you are referring to the lease?

A Yes.

Q You thought that the equipment should be returned to the Strick Division?

A Under the lease.

Q To Strick?

THE COURT: That is what the lease provided?

THE WITNESS: I cannot really tell you who owns the equipment. I don't have that information nor was I ever

furnished it but from everything we had, our decision was it should go back to Strick.

Q Did anyone ever tell you, Mr. Weber, who-- excuse me.

After January 11, 1966, did anyone ever tell you that Fruehauf Corporation did not own the equipment, or that to put it another way, that Strick did own the equipment?

A We had been told by Strick Division -- Strick Corporation, that they owned the equipment. We have been told by Fruehauf and by "we" I mean that one of the officers of Seatrain Lines has been advised by Fruehauf that they thought they owned the equipment.

In other words, we are the middlemen.

Q I don't know that it is a fact but I will accept what you were told.

When were you first told by Strick, if you recall?

A I think it was around 1968. I know we had knowledge that around that time there was a dispute in ownership.

MR. PRATT: No further questions.

MR. CANTOR: Thank you.

THE COURT: I understand the payments under the lease were made to the Fruehauf Finance Company.

THE WITNESS: Yes. Our understanding was there was a financial understanding between Strick Corporation and Fruehauf in which they financed this equipment through the Fruehauf Corporation which is nothing unusual, you can do it through another company, or through a bank, and so forth.

THE COURT: Thank you.

(Witness excused)

MR. CANTOR: Judge, I have no other witnesses other than on valuation and pursuant to what we said before, I would request that we adjourn now and pick up on Monday with the completed cross-examination, then we will go on with our expert.

THE COURT: You have made satisfactory arrangements with Mr. Pratt regarding your access to Mr. Henkels?

MR. CANTOR: Yes, sir.

THE COURT: So you will be able to cross-examine him on Monday morning?

MR. CANTOR: I hope so.

THE COURT: We will recess until Monday morning at ten o'clock.

Now, I do not know what courtroom we will be in. I think if you contact my chambers tomorrow afternoon

we should know or perhaps you can be in touch with counsel, Mr. Alonso.

In any event, we will see that notice gets to counsel as to what the courtroom will be on Monday, at ten o'clock.

(Adjourned to Monday, December 13, 1976, at 10:00 a.m.)

FRUEHAUF CORP.,

Plaintiff,

v.

SEATRAIN LINES, Inc., and STRICK CORPORATION,

Defendants.

73 Civ. 120

December 13, 1976
10:00 a.m.

(Trial resumed)

C E C I L H E N K E L S, resumed:

CROSS-EXAMINATION (continued)

BY MR. CANTOR:

MR. PRATT: Your Honor, before we begin, attorney for defendants and attorney for the plaintiff --

THE COURT: You better use that microphone I am sorry to have to remind you.

MR. PRATT: Your Honor, the attorneys for both sides would like to make a stipulation. This may already be in the record but just for clarification purposes:

Seatrain Lines Inc. made its payments

to Fruehauf Corporation and Fruehauf forwarded these on to Fruehauf Finance Corporation.

MR. CANTOR: That is correct.

THE COURT: We already have that. It was something over $2000, wasn't it?

MR. CANTOR: That is a separate issue with respect to the destroyed equipment.

THE COURT: You are talking about the payments under the lease?

MR. CANTOR: Yes, your Honor.

THE COURT: Yes, that has been mentioned several times.

CROSS-EXAMINATION

BY MR. CANTOR:

Q Mr. Henkels, I think we had some discussion Friday during your direct examination about Flexivan-type equipment, is that correct?

A Yes.

Q Can you tell us what your understanding is of Flexivan-- let me back up.

That was the type of equipment involved in the lease, was it not?

A According to the lease, yes.

Q Can you tell us what your understanding is of

Flexivan-type equipment?

A There is only one Flexivan type of equipment. It is an invention that has been patented and Flexivan is Flexivan-type equipment.

Generally speaking and roughly speaking, it is a semi-trailer type of box from which the wheels can be detached. Also, it can ride on a rail car, on a turntable, and also ride on a steamship.

Q What I was getting at, sir, the Flexivan design does not affect the size and weight of the van itself, is that correct?

THE COURT: Do you mean whether there are Flexivans of different sizes?

MR. CANTOR: Yes.

A Yes, there are.

Q Let's back up.

Perhaps the record is not as clear as it can be.

The Flexivan design refers, does it not, to the concept of being able to remove the bogies as well as certain appurtenances to the containers that allows that to happen, is that correct?

A Yes.

Q But you can have different size, different

weight containers incorporated in the Flexivan design, is that correct?

A Yes, sir.

Q And, in fact, sir, if you know, the type of container that was used under this lease was a heavy container. Is that a fair statement?

A It was a refrigerated type of container which would be heavier than any dry freight type of container.

Q In addition to being a refrigerated type of container, it had steel corner castings, is that correct?

A All containers have steel corner castings.

Q The steel corner castings also add to the weight of the container, is that correct?

A It could be, yes.

Q Sir, the additional weight as compared to a dry van, and, incidentally, Plaintiff's Exhibit 11, the exhibit that was put in on Friday, was a dry van, is that correct?

A Yes.

Q The heavier equipment that we are dealing with here, does that excess weight have any effect on the use of the trailer for over-the-road purposes?

A Any heavy piece of equipment has a difference as far as over-the-road allowability by the different

Commissions for the weight of equipment moving over the road is concerned.

Q Would it be fair to say, sir, that heavy equipment would be less valuable for over-the-road use than a lighter piece of equipment?

A It depends on what it is used for.

Q For hauling freight over the road.

A If it is used for handling refrigerated cargo, much of the time refrigerated containers carrying refrigerated cargo can be loaded to capacity because the refrigerated cargo, many times, is lighter than the general cargo.

MR. CANTOR: Can I have the answer, please?

(Record read)

THE COURT: This simply means it depends upon what you put in the container.

Is that right?

THE WITNESS: Yes.

Q But leaving aside the variations in what you are going to put in the container, you are better off with a lighter container for hauling over the road, isn't that correct?

A It depends what the type of merchandise is. You cannot use a dry container for refrigerated type freight.

Q Sir, let's talk about the Flexivans in 1972.

Isn't it the fact that Flexivans were outmoded by 1972?

A Flexivans were no longer manufactured in 1972, correct.

Q And the reason for that, is it not, a different type of universal chassis design had been invented and that was not compatible with the Flexivan system?

A Right.

Q For the edification of the Court, let me show you this brochure-type photo--

MR. CANTOR: Perhaps we can mark it for identification as Defendants' Exhibit YY.

xx (Defendants' Exhibit YY marked for identification)

Q Sir, is Defendants' Exhibit YY for identification a fair representation of the new chassis design that I just asked you about?

A Yes.

MR. CANTOR: I will offer it in evidence.

THE COURT: You say Flexivans were no longer manufactured after 1972. I take it they were still in use?

THE WITNESS: Yes, sir.

MR. PRATT: No objection.

xx (Defendants' Exhibit YY received in evidence)

Q Now, sir just so we are clear, the Flexivans that were still in existence by 1972 were not compatible with the type of chassis that is shown in YY, is that correct, without some modification?

A Correct.

Q Would it be fair to say, sir, that incompatibility limited the utility of Flexivan equipment by 1972?

A Yes.

Q Would it be fair to say, sir, by 1972, the main use for used Flexivan equipment would be for storage box purposes?

A Many Flexivans were still used for transportation in 1972.

Q What I am getting at, sir, we are talking now about equipment that was eight years old and that had been subjected to the normal wear and tear of eight years.

Let me ask you to assume that fact.

Assuming eight-year old equipment that was no longer compatible with the current industry standards of the chassis you have just seen, wasn't the likelihood that that equipment which would be resold would be for storage box purposes and not for hauling freight?

A Not necessarily.

Q Sir, if you were going to use it to haul freight,

you would have to make modifications on it, is that correct?

A Not necessarily.

Q Were there any bogies around in 1972-- withdrawn.

Were there sufficient bogies still around in 1972 to adapt to this Flexivan equipment?

A Yes.

Q There were?

A Yes, sir.

Q Let me ask you this, sir: This equipment you know under the lease was to be used at sea for eight years, is that correct?

A Not at sea.

Q Well, it was being used, among other purposes, to haul cargo to Puerto Rico, was it not?

A Yes, two-day trip.

Q But it was going to be used for two days and two days and two days for a period of eight years, that wasn't just one trip?

A That is correct.

Q What would you expect the normal wear and tear to be on containers that were used at sea for eight years periodically?

A That is difficult to answer.

Q Why is that?

A What I would expect of them?

THE WITNESS: Can I have the question again?

Q I will put the question again.

You know under the lease the equipment was to be returned in good repair, normal wear and tear excepted.

Is that a proper paraphrase?

A Yes.

Q After eight years of use including eight years at sea hauling freight down to Puerto Rico, what would you expect to be the normal wear and tear on this equipment, and particularly the containers?

A I don't know how to answer that question, what would be the normal wear and tear, because the lease states it must be returned to the lessor in the same condition in which it was given to them except for fair wear and tear.

Now, fair wear and tear is just normal usage.

Q But the normal usage here was usage at sea.

A That would make no difference because it is actually a piece of equipment that is aluminum, which is not affected by the sea, to speak of, and the refrigeration units were of a marine type which means they had stainless steel components and seals for the sea part of the trip.

Q So your testimony, sir, is that you would not expect eight years of exposure at sea to have any appreciable effect on this type of equipment just in normal usage, is that your testimony?

A Yes, because I have had the same thing myself for over eight years.

Q Is it also your testimony, sir, that after eight years you would expect this equipment to be usable except for storage box purposes?

A Except?

Q Yes.

A You mean storage box purposes only?

Q Let me put the question again.

I am asking you the same question I asked before and that is: Would not your expectation be after eight years that this equipment would be usable for storage box purposes?

A Yes, it would be.

Q If you are going to use it for storage box purposes, you don't need the bogies?

A Correct.

Q If you are going to use it for storage box purposes, you don't need the diesel generator sets, do you?

A It depends where it is being used for storage.

Q Wouldn't a more efficient way, if you were going to use it for storage box purposes, just to run a line and plug it in and not run a generator 24 hours a day?

A Yes. However, if you are out in the middle of a desert and you have no electricity, you have to use the gen set.

Q Other than that?

A Yes.

Q I think you have told us already, sir, that you were not in fact in the used equipment business in 1972, is that correct?

A That is correct.

Q Do you know, however, what the market was for used equipment in 1972?

A I certainly do. It was part of my business to know what the market is.

Q What was it, sir?

A It was good.

Q Didn't you tell me on Friday it was fair?

A Fair to good. I don't know whether I said fair or good.

Q You don't remember?

A It was good.

Q Your testimony today is that it was good?

A Fair to good, if that is the answer you want.

Q I want the truth. Was it fair or good, or fair to good?

A I would say it was good.

Q But you were not in the business of buying and selling used equipment in 1972?

A That is correct.

Q Let me ask you another question, sir. You gave us a price, I think when you testified on Thursday, I think you said $2000 for a container, $1000 for a bogie and $1500 for a generator set; was that your testimony?

A Yes.

Q Would your testimony be affected any if you were trying to sell 100 units rather than one unit?

A No.

Q So you think you could get the same price for one hundred units that you could get for one unit?

A Certainly.

MR. CANTOR: Your Honor, I am going to read from a pretrial order entered on June 17, 1974, paragraph 3A.

"The parties stipulate that the following facts are not in dispute in this action (each party reserving the right to object to the materiality of any such stipulated

fact and its relevancy to the issues):

Then skipping over to letters vii,

"The value of the equipment leased under the lease dated February 6, 1964, as amended on November 30, 1972, was between $90,000 and $100,000."

Q Sir, did you know that Fruehauf in fact had entered into such a stipulation in this case?

A No, sir.

Q Had you known that fact, would that have affected your opinion that you are giving to us today?

A No, sir.

MR. CANTOR: I have no further questions.

REDIRECT EXAMINATION

BY MR. PRATT:

Q Mr. Henkels, on the cross-examination, counsel has brought out there were certain limitations on the use of the equipment at issue here due to the change, making everything uniform,isn't that correct?

A Yes.

Q When you gave your expert opinion as to the value of this equipment, were you aware of all these limitations?

A Yes, sir.

Q Isn't it true that-- or is it true, let me put

it this way-- that a truck line, a small trucker or anybody for that matter, could still use this equipment to haul refrigerated freight if he wanted to?

A Yes, sir.

Q And you also testified that you were aware in 1972 of the value of the type of equipment at issue here?

A Yes, sir.

Q At any time during that period, although you were not specifically in the business of buying and selling used equipment of this type, during that time did you ever receive any inquiries as to the value of that type equipment?

A I never received any inquiries as to the value of that type of equipment, but I received information from people who wanted that type of equipment and who would pay as high as $2500 to $3000 for a box.

Q Did you tell them what your opinion was as to what it was worth?

A Yes.

Q Just to clarify a point: You testified on Thursday that the value per trailer was $2000?

A Per box.

Q You testified that the value per box was $2000. Would it be your testimony that the value of

98 boxes at the time in question would be $196,000?

A $2000 per box for how many of them there were.

Q It would make no difference in your valuation of the box whether there were four boxes or 50 or 60 or 98 or 103, is that true?

A That is correct.

Q Is that also true of gen sets and bogies?

A Yes.

Q Are you aware now and have you been aware since at least 1972 of the value of this type of equipment we have been talking about?

A Yes.

MR. PRATT: No further questions.

RECROSS-EXAMINATION

BY MR. CANTOR:

Q Let me show you Defendant's Exhibit AAW and tell you that Mr. Hadley, who was a Fruehauf employee and I believe the branch manager of their Chicago branch testified that this equipment covered by AAW was comparable equipment to the equipment that is involved here in the lease.

Sir, that document-- take your time -- it is difficult to read but we have a transcribed record concerning it if necessary--shows storage containers sold as storage

boxes for $950 apiece.

Can you make that out from the document?

A No, I can't.

Q Let me see if I can help you.

Fruehauf storage box, $950.

A It says here "net value $1900."

Q For two boxes.

A Is that what that is?

Q Yes.

Let me ask you to assume that the testimony concerning that exhibit was that it was comparable equipment and let me ask you to further assume that the sales price by Fruehauf of that comparable equipment was $950 and let me ask you to further assume that before getting $950 Fruehauf had to do $122.50 worth of modification to the equipment.

Assuming all those facts, sir, does that change your opinion as to what one of these containers was worth?

A Does it what?

Q Does that change your opinion as to what one of these containers was worth?

A No.

Q I will add a further fact that that equipment was eight years old at the time it was sold in June of 1972

and it was 1964 equipment.

Does that affect your testimony?

A No.

Q And you would not change your testimony?

A No.

MR. CANTOR: I will offer AAW.

MR. PRATT: No objection.

xx (Defendant's Exhibit AAW received in evidence)

MR. CANTOR: No further questions.

MR. PRATT: No questions.

(Witness excused)

MR. CANTOR: Mr. Rensel, please.

B E R N A R D R E N S E L, called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CANTOR:

Q By whom are you employed?

A Jilco Equipment.

Q What is Jilco Equipment?

A It is primarily a company that leases refrigerated trailers. We also sell them and presently I am VP of the company.

Q For how long have you been employed by Jilco

Equipment?

A Since July 1972.

Q Prior to that, sir, can you give us your work experience and go back a reasonable amount of time?

A I only had one job. I worked for Strick Trailers from 19 -- the end of 1947 to mid-1972 in the Used Trailer Department all the time.

Q What was the last position you held with Strick before going over to Jilco?

A I was Used Trailer Manager of the Philadelphia branch.

Q I take it in that capacity, you had the opportunity to evaluate the worth of used trailers, is that correct?

A I did.

Q Are you familiar, sir, with the equipment we are involved with here?

A Yes.

Q Can you just describe in general terms that equipment for the Court?

A The Seatrain equipment in my estimation is a combination of Flexivan and a container system, refrigerated.

Q Could you describe, particularly talking about

the containers, would you describe those as heavy containers, light containers, or somewhere in between?

A In my estimation they were heavy containers because they had the Flexivan and container capabilities all in one.

Q Does the weight of the container, sir, have any effect in terms of the overall utility of the container?

A Over the road?

Q Yes.

A Definitely.

Q Could you tell us what that effect is?

A Various states have different weight restrictions and the weight, of course, is the combination of the trailer, the tractor and the load, and if your trailer is heavier, of course, you can't carry as much weight in it.

Q Sir, incidentally, when you were at Strick, I take it you were familiar with the term "ordinary wear and tear" as it applied to equipment coming back off of lease?

A Yes, sir.

Q Can you tell us what you would expect to be the condition of containers that were eight years old that had been used for seagoing purposes within that definition, good repair, ordinary wear and tear excepted?

A I would expect the bodies to be tight, as such,

meaning no holes in the roof, the door is capable of being closed, the inside lining still intact, no holes in the floor.

Q What about the general condition, any effects from the sea and so forth?

A I would expect the container outwardly to show more wear and tear in eight years than an over-the-road trailer would.

Q There was some testimony from Mr. Henkels this morning about the chassis system that went into effect and which pretty much replaced the Flexivan type of equipment.

Are you familiar with that chassis design?

A Yes.

Q Are you familiar with what that new design did to the value of Flexivan equipment, at least unmodified Flexivan equipment, by 1972?

A It certainly wasn't adaptable in its present condition at that time to the new chassis system and as such, you couldn't incorporate it. The only way you could haul that Flexivan type container would be either on the Strick wide-slide bogie or put it on a flat trailer.

Q Did that have any effect on the value of that type of equipment by 1972, assuming it was not modified?

A Yes.

Q The containers we are talking about here, what would they be likely to be used for coming off an eight-year lease without being modified?

A As a storage box.

Q If you are going to use it as a storage box, do you need the bogies?

A I would say it would be advantageous to have the bogies for the storage box just to move it from one place to the other; otherwise you would have a problem.

Q But you don't need the bogies for purposes of hauling?

A Just to move it to the place you have it to be used as a storage box.

Q So the bogies don't have to be in the same shape as for over the road use?

A No.

Q The same question with respect to the diesel motor generator, leaving aside using it in the desert. If you are using it some place close to electricity, you will not need a diesel motor generator?

A No, sir. If you were going to use it for storage and put it on the ground, that diesel generator was adaptable to fit underneath the trailer, the trailer body, and if you put the thing on the ground, I don't know where

you would put the gen set; you would have to connect it some other way.

Q Let me ask you, sir, you are familiar with the equipment and we are talking about 98 containers, 38 diesel motor generators and 100 bogies.

Let me ask you first for one complete set, what is your opinion as to what that equipment would have been worth in 1972, eight years old, when it came off the lease having been used for eight years, ordinary wear and tear excepted?

A I would say $1000.

Q For one complete set.

Let me ask you what you think --

THE COURT: What do you mean by a complete set; the box, the bogie and the generator?

MR. CANTOR: Yes, sir.

Q Now I am asking-- $1000 for a complete set, right?

A Yes.

Q For all the equipment, 98 vans, 38 generators and 100 bogies --

THE COURT: I thought it was 25.

MR. PRATT: 40 gen sets.

MR. CANTOR: It is 38. Two had been damaged

and paid off a few months earlier. It was 25 originally, then it was increased to 40 and two were damaged, and paid off, so it was down to 38.

Q 98 containers, 38 diesel motor generators and 100 bogies.

Do you have an opinion, sir, as to what a fair market value would have been for all that equipment eight years old on November 30, 1972?

A You mean selling it all at one crack to one person, get rid of it all at once?

Q Yes.

A I would say $800 or $900.

Q Per complete unit?

A If you could average out that.

Q In fact, you wouldn't have 98 complete units because you only had 38 generator sets?

A Yes.

Q So it would be something less than $800 to $900 times 100, is that a fair statement?

A Yes.

Q Let me ask you to assume, sir, that the Strick Corporation was able in 1972 to dispose of all of this equipment for $98,000; would you have an opinion as to whether that was a fair and reasonable price for the

equipment?

A If Strick had asked my opinion if they should have sold it at that price, I certainly would have told them to sell it.

MR. CANTOR: No further questions.

CROSS-EXAMINATION

BY MR. PRATT:

Q Mr. Rensel, do you know if any of the generator sets of the type at issue here are still in use today?

A I imagine so. Generator sets like that are still in use. There is some still very old equipment running around.

Q Do you know if there are any bogies of this type in use today?

A There are, sir.

Q How about the containers?

A That type of container?

Q If you know.

A No, I don't know. I don't know of anybody using that type of equipment. The container only we are talking about?

Q Yes.

A All right, sir.

Q Tell me, Mr. Rensel, what is the business of

MR. CANTOR: Defendant rests once again, your Honor.

THE COURT: Mr. Pratt? Anything else?

MR. PRATT: No, your Honor, unless your Honor would like a closing argument which might be very brief. If not, we will submit proposed findings of fact and a memorandum of law.

THE COURT: Do the parties care to submit briefs? I suppose they would.

MR. CANTOR: I would think so, your Honor, yes.

THE COURT: Within what time?

MR. CANTOR: My preference would be if the plaintiff would put in a posttrial brief first and we could respond to that, then perhaps the plaintiff could reply if it chose to.

THE COURT: How soon can you have your memorandum, Mr. Pratt?

MR. PRATT: Would two weeks be satisfactory, your Honor?

THE COURT: Yes.

MR. PRATT: We will put t. memorandum in two weeks from today.

THE COURT: December 27.

How much time to respond?

MR. CANTOR: I would like two weeks to respond if that is OK, your Honor.

THE COURT: You can do things even more rapidly over the holidays. You don't have the interference of court appearances.

What date are you suggesting?

MR. CANTOR: The 10th of January if that is agreeable with your Honor.

MR. PRATT: I would like just one additional week, then, your Honor.

THE COURT: You mean to respond?

MR. PRATT: If we think we need to.

THE COURT: If indeed you find that necessary.

MR. PRATT: Yes.

THE COURT: In view of that, I will be glad to hear anything that any of you care to say by way of argument on the facts or law.

MR. PRATT: Your Honor --

THE COURT: I am not asking for it. We are all here and this is an opportunity to do so should you choose to.

MR. PRATT: I would just be very brief hoping to put a more thoughtful position of the trial but I would make several posttrial observations:

1. What it all boils down to is whether or not the obligations of Seatrain Lines Corporation under a duly executed lease were breached by Seatrain Lines and with a collateral issue, whether there was an inducement to do that by Strick, but it seems to me although Strick and Seatrain had ample opportunity to do so, there was never any amendment to this lease.

There has been an awful lot of testimony as to what might or might not have been intended, but it seems to me the lease as originally constituted was adhered to by

both parties, lessor and lessee.

It also seems to me there was no dispute and no quarrel with any of the terms of the lease until such time-- despite the fact that a divestiture agreement was entered into January 11, 1966.

Everything proceeded until it came time to give the trailers back, then it seems to me there were arguments made out of whole cloth.

I don't think any of the testimony offered -- excuse me -- I think once the plaintiff has shown that it delivered the trailers and it complied with its obligation under the lease and once it had shown a breach of that lease, it was incumbent upon Seatrain to overcome, to rebut that prima facie case with a preponderance of the evidence that would in some way change the lease.

THE COURT: What do you claim was the breach by Seatrain?

MR. PRATT: Not giving back the equipment to the Fruehauf Corporation.

THE COURT: And electing to deal with the other defendant?

MR. PRATT: Exactly.

As far as valuation goes, I would have no comment on that at all. I would rather let the record

speak for itself and with those few brief observations, which I hope to expand on in our trial memorandum, I conclude.

MR. CANTOR: Your Honor, I will be similarly brief, but again, just to put this in the context that existed at the time, in May of 1965, the FTC ordered Fruehauf to divest itself of all the assets of its Strick Division and it defined the term "assets" to include any properties, rights and privileges, tangible and intangible, including but not limited to plants, machinery, equipment, and it went on from there.

The language is before your Honor both in the form of a copy of the FTC opinion and in Defendant's Exhibit AD in evidence.

That was the context that the negotiations were conducted under and Mr. Pratt speaks as if there had never been a divestiture order or a compliance agreement.

Your Honor has a copy of the purchase agreement, Plaintiff's Exhibit 4, and a copy of the approved balance sheet under the purchase agreement, Defendant's Exhibit E.

Those two documents I submit make clear that this category of equipment, namely, equipment leased to others, was meant to be sold as part of the divestiture.

What was not then to be sold, and the only

reason we have some confusion here is that the lease payments that were due under the lease agreement had already been discounted with Fruehauf Finance and as a result of that, the lease payments themselves were continued to be made to the Fruehauf Corporation, then passed on to Fruehauf Finance, but the equipment, the residual equipment under the lease, your Honor, I submit fits somewhere within two separate provisions of the purchase agreement; one is the category Trailers Leased to Others or Equipment Leased to Others, as broken out in the approved balance sheet and the other is under the category "moveable equipment wherever located used in the operation of the Strick Division, whether or not given a carrying value on the balance sheet."

On the liability phase, your Honor, that is our position with one additional fact that Mr. Silverstein, the accountant, who testified on Wednesday, admitted that had there not been a divestiture and had the assets not been sold, the Strick Division would have ended up with this equipment under the normal operations of Fruehauf.

Fruehauf Finance Company is not an operating division in the sense of the running equipment.

If your Honor looks at the language and what the parties were trying to comply with, assets shall include any property, rights and privileges, tangible and

intangible; even under that language, the Strick Division must have had an intangible interest, a right in this equipment. They were going to get it back if they had stayed within Fruehauf, and I submit it would be flying in the face of the FTC order and the Court of Appeals order to suggest that they don't get the equipment back now because of some financing arrangement with respect to the lease rentals.

On the question of valuation, your Honor, the parties had agreed all along what the equipment was worth. The Strick Corporation, in fact, sold the equipment for $98,000 in what both Mr. Weber, the Seatrain Vice President and Mr. Bachman, the Strick Vice President, said was an arm's length transaction.

Your Honor, experts often differ and the only thing I can say about that, the best evidence of what the equipment was worth is what it was sold for at the time, and it was sold for $98,000 and there is no suggestion at all in this record that that was not an arms-length transaction.

I have nothing further to add at this point, your Honor.

THE COURT: The Court will reserve decision.

...

DECISION AND OPINION BY LUMBARD, D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

FRUEHAUF CORPORATION, :

Plaintiff, :

-v- :

SEATRAIN LINES, INC., and :
STRICK CORPORATION, :

Defendants. :

----

73 Civ. 120

45630

Appearances:

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Brian T. Naylor, Esq.

LUMBARD, Circuit Judge:*

In this diversity action tried to the court on December 8, 9, and 13, 1976, plaintiff Fruehauf Corporation seeks to recover approximately $400.000. in damages from defendants Seatrain Lines, Inc. and Strick Corporation.[1/] Fruehauf alleges three causes of action: (1) that defendants converted certain equipment, worth approximately

*Sitting by designation.

$400,000., alleged to be the property of Fruehauf; (2) that Seatrain leased the equipment from Fruehauf and violated the terms of the lease by failing to return the equipment at the expiration of the lease on November 30, 1972 and by modifying the equipment; and (3) that Strick induced Seatrain to turn the equipment over to Strick at the expiration of the lease and, thereby, to violate its terms.[2/]

On January 21, 1966 an order of the Court of Appeals for the Seventh Circuit, which enforced an order of the Federal Trade Commission, directed Fruehauf to divest itself of the assets of its Strick Division. By agreement dated January 11, 1966, dated the same day that Fruehauf submitted its proposal for a final consent order of the court of appeals for the FTC's approval, Fruehauf sold the assets of its Strick Division to the newly formed Strick Corporation. The sole question for decision is whether title to the equipment, which Strick Division had leased to Seatrain, passed to Strick Corporation or whether it remained in Freuhauf. The court finds that title did pass to Strick Corporation and, accordingly, the complaint is dismissed.

The Strick Company, engaged in the business of manufacturing, selling and leasing trailers and accessories was acquired by Fruehauf on January 1, 1956. While the

Strick Company lost its separate corporate identity after its acquisition as the "Strick Division" it remained largely autonomous except for financial matters. Thus, it maintained its own management, engineering, sales, leasing and design departments and operated in competition with the Fruehauf Division, which also manufactured and sold trailers.

Under an agreement dated February 6, 1964 Strick Division leased to Seatrain 100 refrigerated containers, 100 bogies,[3/] and 25 diesel generators (later increased to 40 generators). The lease was for a period of 96 months, ending November 30, 1972 and it specified that at its expiration the equipment was to be returned to Strick Division "in the same condition and state of repair...reasonable wear and tear excepted."

Under Fruehauf's accounting practices, the Seatrain lease was a "full pay-out lease"--one in which the total rentals after deducting interest charges, was more than 90 per cent of the cash selling price of the equipment. Fruehauf began in 1964 to treat such full pay-out leases as sales contracts for purposes of intra-company accounting. Because of this procedure the residual value of the equipment (i.e. the value of the equipment remaining at the expiration of the lease) was no longer given any value on Strick Division's books. Further, in December, 1964, the lease, which had been treated for intra-company purposes as a sales

contract, was sold to Fruehauf Finance Corporation (hereinafter "the Finance Co."), a separate corporate entity, wholly owned by Fruehauf Corporation. Fruehauf received the discounted value of the remaining lease payments in cash and Strick Division received an intra-company credit in this amount. Adolph T. Silverstein, Fruehauf's controller, explained that Strick Division received no credit for the value of the residuals and that, had it not been for Fruehauf's subsequent divesture of Strick Division, the equipment would have been returned to Strick Division. Thus, the net effect of these paper transactions was a sale of the right to Seatrain's lease payments to the Finance Co. Plaintiff does not appear seriously to contest, and the court finds, that the Finance Co.[4/] did not acquire any possessory interest in the underlying equipment and that the right to the residuals remained with Strick Division of the Fruehauf Corporation. Seatrain continued to make rental payments to Fruehauf throughout the life of the lease, which payments Fruehauf forwarded to the Finance Co.

At the expiration of the lease in 1972 both Fruehauf and defendant Strick Corporation (by then again a separate corporation) claimed ownership of the equipment and each offered Seatrain an indemnity regarding the disposition of the equipment. Seatrain elected to recognize Strick as the owner of the equipment.

DECISION AND OPINION BY LUMBARD, D.J.

On August 17, 1956, shortly after Fruehauf acquired Strick Company, the Federal Trade Commission filed a complaint against Fruehauf alleging violations of the anti-trust laws. Almost nine years later, the FTC issued a final order, see 67 FTC 878 (May 28, 1965), which required, inter alia, that Fruehauf completely divest itself of all assets of its Strick Division. "Assets" was defined to include "any properties, rights and privileges, tangible and intangible, including but not limited to all plants, machinery, equipment, contract rights,...." 67 FTC at 939.

On January 21, 1966 the Court of Appeals for the Seventh Circuit entered an order, upon the joint motion of Fruehauf and the FTC, which incorporated verbatim that part of the FTC order mandating divesture of Strick Division. During the time between the FTC order of May 1965 and the final order of the court of appeals, Fruehauf began negotiations with executives of its Strick Division looking toward a sale of the Strick Division assets to a corporation to be set up. These negotiations culminated on January 11, 1966 in an agreement between Fruehauf and the new Strick Corporation, the defendant herein. All the evidence shows that this agreement was intended to comply with the language of the FTC order, which was adopted by the court of appeals upon the joint motion of Fruehauf and the FTC ten days after the sales agreement was signed. Mr. Bachman, who became vice president and

a director of Strick Corporation and who was present at all of the negotiations, testified that the negotiations took place "with that language in front of us practically all the time" and that the January 11 agreement was intended to comply with the FTC order. Mr. Silverstein, who was present at most of the negotiations as Fruehauf's representative, also testified that the agreement was intended to comply with the FTC order. In fact, the order is referred to on the first page of the agreement itself.

The January 11 agreement did not separately list each asset to be sold; rather, the assets were listed by broad categories, such as "Inventories" and "Plant, Property and Equipment," which were used in the Strick Division comparative balance sheet. Section 2(a) of the agreement provided that "the classification 'Property, Plant and Equipment'...shall include...all movable equipment wherever located used in the operations of the Strick Division, whether or not expensed or charged off or for other reason not given a carrying value on the Comparative Balance Sheet or the Approved Balance Sheet."

Section 5(a) provided for the preparation of the "Approved Balance Sheet," which was to be prepared as of the close of business on December 31, 1965 and which categorized the assets to be purchased and the liabilities to be assumed by the buyer. Bachman and Silverstein agreed that the total sales price was approximately $39,000,000., of which approximately $22,000,000. was for

assets given a carrying or "book" value on the Strick Division balance sheet and the remaining $17,000,000. was for assets not given a book value.

Three witnesses testified regarding the negotiation of the January 11 agreement and the intent of the parties. Fruehauf called Silverstein and Ernest Rushmer, its general counsel at the time of the sale. Defendants called Martin Bachman.

Silverstein testified that it took approximately two and one-half months to work out the "nuts and bolts" of the agreement. To Silverstein's knowledge the Seatrain lease was never specifically discussed and the "residuals" (the equipment to be returned at the expiration of the lease) were not covered in the January 11 agreement. According to Silverstein, some equipment leases were sold to Strick and others were retained by Fruehauf; however, Silverstein failed to specify which leases were sold or what, if any, distinction was drawn between those leases sold and those retained. Rushmer also stated that the Seatrain lease was not specifically discussed during the negotiations and that it was his belief that the residuals were not transferred to Strick under the January 11 agreement. In reference to section 2(a) of the contract, Rushmer stated that in his opinion the language "and all moveable equipment wherever located" covered only equipment used in a plant.

In contrast, Bachman testified that the category of "Property, Plant and Equipment" (in section 2(a)) was intended to cover equipment leased to others. Although the Seatrain lease was not specifically discussed, he stated that at the time the agreement was entered into it was Strick's understanding that all equipment under lease was included in the sale. In fact, according to Bachman, the language "and all movable equipment wherever located used in the operations of Strick Division, whether or not expensed...or for other reasons not given a carrying value ..." was purposely inserted to include equipment which, like the Seatrain residuals, would not appear on the balance sheet because it had no book value; further, he indicated that this language was intended as a catchall to ensure compliance with the FTC order that all Strick Division assets be divested. Bachman also indicated that he knew of no situation comparable to the Seatrain lease in which the residuals were retained by Fruehauf.

The court credits Bachman's testimony; it is consistent with the predominant purpose of the sales agreement,which was to comply fully with the order of the FTC. It is black letter law that a contract should be interpreted in light of its principal purpose, see, e.g., Rothkopf v Lowry & Co., 148 F.2d 517, 520 (2d Cir. 1945); Aron v Gillman, 309 N.Y. 157 (1955), and that the circumstances that existed at the time of contracting are

relevant in determining the parties' probable intent. See 3 Corbin on Contracts §§ 537, 543 (1960). The principal purpose of the January 11 agreement was to conduct a sale of assets in conformity with the FTC order, which required, inter alia, that Fruehauf divest itself of "all assets of its Strick Division" including "any properties, rights and privileges, tangible and intangible...." Strick paid approximately $17,000,000. for assets which, like the residuals, had no book value. The court finds that the parties must have intended (or at least Fruehauf must be held to have understood the meaning attested to by Strick) the "movable equipment" language to cover precisely the situation at hand: a dispute over property that would otherwise fall within the heading of "Property, Plant and Equipment" but which was likely to be overlooked and discovered at a later date because it was not carried on the Strick Division's books.[5/] It is hard to imagine that the parties could have meant to leave Fruehauf any assets or any right to reclaim assets which had been owned or controlled by Strick Division. There is virtually no evidence of such intention and the agreement and actions of the parties confirm this conclusion.

Fruehauf contends, however, that the conduct of the parties after the January 11 agreement was inconsistent with the theory that title to the residuals passed to Strick. Although it sets forth a number of examples,

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the evidence in support of these arguments is, at best, equivocal. First, Fruehauf points out that Strick never requested an assignment specifically transferring title to the residuals, despite a specific section of the contract providing for such documentation in the case of assets held by third parties. However, Fruehauf did in fact execute a general assignment and bill of sale that was undisputably sufficient to convey title to any asset covered by the agreement. Further, since Fruehauf contested Strick's ownership of the residuals, the request suggested by plaintiff would have been futile.

Second, Fruehauf asserts that after the January 11 sale Seatrain continued to make rental payments to Fruehauf. However, Strick does not now and has never claimed the right to the rentals. The right to these payments was sold by Strick Division to the Finance Co. and Strick Division received compensation by means of an intra-company credit. Similarly, Fruehauf points out that when certain of the equipment was damaged, Seatrain paid Fruehauf for the wreckage and accepted from it transfer of title. Assuming that Seatrain's belief as to the ownership of the residuals is relevant, Mr. Weber, who handled this transaction for Seatrain, testified that the payment was not intended in any way to express Seatrain's opinion as to ownership but was merely made in accordance with Seatrain's general policy of making damage payments to the party that accepts rental payments. In this regard it is noteworthy that

at the expiration of the contract, Seatrain considered Strick to be the owner of the equipment and accepted Strick's offer of indemnity.

Third, Fruehauf points to Silverstein's testimony that Fruehauf had sold some leases similar to the Seatrain lease and had retained others. In this regard Silverstein stated that in those cases in which leases "similar" to the Seatrain lease were sold, "Strick Corporation paid us the then book value of the equipment underlying those leases." Since the Seatrain lease residuals did not have a book value the leases Silverstein refers to could not have been "similar" to the Seatrain lease.[6/] In any case, as was noted earlier, Silverstein's testimony in this area was ambiguous at best and was specifically controverted by the testimony of Bachman which the court credits.

Weighing the evidence on both sides, Fruehauf has failed to show any conduct meaningfully inconsistent with the court's interpretation of the contract. The court finds that the right to the equipment at issue was passed to Strick in the January 11 agreement. Accordingly, the equipment was properly returned to Strick at the expiration of the lease and Fruehauf suffered no damages by Seatrain's technical violation of its lease.[7/]

This opinion consitutes the court's findings of fact and conclusions of law. Fed. R. Civ. P. 52.

DECISION AND OPINION BY LUMBARD, D.J.

Complaint dismissed.

J. EDWARD LUMBARD
United States Circuit Judge
(Sitting by designation)

Dated: New York, New York
February 24, 1977.

DECISION AND OPINION BY LUMBARD, D.J.

Footnotes

1/ Fruehauf is a Michigan corporation, with its principal place of business in that state; Seatrain incorporated in Delaware and Strick in Pennsylvania have their principal places of business in states other than Michigan.

2/ The equipment was never physically returned to Strick; instead, Strick sold the equipment to Seatrain for $98,000.

3/ A "bogie" is a rear wheel assembly, with at least four wheels on two or more axles which is mounted so as to support the rear of the truck.

4/ It appears that the Finance Co. assigned all of its interest in the lease to Fruehauf on December 4, 1972.

5/ At first glance there may seem to be some incongruity in referring to the residuals as "equipment...used in the operation of Strick Division." However, it must be remembered that one of the "operations" in which Strick Division was engaged was the leasing of its products. Further, the sentence structure of this part of the agreement itself supports the construction that the "movable equipment" clause was intended to serve a broad catchall purpose for assets that had no carrying value and might otherwise be overlooked. The need for such a clause is particularly evident in the case of equipment such as is at issue

here, which had been written off the books and was in the hands of a third party under a long-term lease. It is also unlikely that the parties would have entirely overlooked this situation as the residual value of the equipment was not insubstantial and Bachman testified that he had personally negotiated the Seatrain lease.

6/ Indeed, it is the fact that the Seatrain lease residuals did not have a book value that distinguishes them and, apparently, occasioned the need for a special clause in the contract to cover assets of this type. Those residuals that were given a carrying value would have been listed on Strick Division's books and it is to be expected that the parties might have made specific arrangements regarding them. Of course, it is possible that Silverstein meant something other than "given a carrying value on Strick Division's books" when he used the term "book value"; however, this is only one example of the ambiguity of his testimony in this area. Similarly, Silverstein testified as to one instance of a lease similar to the Seatrain lease that was retained by Fruehauf. This involved a full pay-out lease of equipment to Milwaukee Motor Transport Co., which after a warranty dispute, was bought from Fruehauf by Strick. Silverstein testified that Strick in this case specifically disclaimed ownership of the underlying equipment. However, Bachman testified that the Milwaukee Motor lease contained an option to purchase, which was so minimal as to ensure its exercise, and was treated from its inception as a conditional sales

contract. Thus, according to Bachman, when the Milwaukee Motor lease was sold to the Finance Co., Strick Division was paid not only for the rental value, but for the option price as well. This was the only evidence put forward by plaintiff of an actual lease similar to the Seatrain lease that was retained by Fruehauf. Assuming this evidence was relevant to ownership of the Seatrain residuals, its probative value is slight.

7/ Defendants also contend that in addition to the category of "Property, Plant and Equipment," the residuals might also be covered under the categories of "Used Trailers" and "Prepaid Expenses and Other Assets" listed under section 2(a) of the agreement. Given the present disposition, it is unnecessary to pass on these arguments.

JUDGMENT APPEALED FROM.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

FRUEHAUF CORPORATION 73 Civil 120 (J.E.L.) C.J.

Plaintiff :

-against- :

SEATRAIN LINES, INC., and :
STRICK CORPORATION JUDGMENT

:

Defendants

- X

The issues in the above entitled action having been brought on regularly for trial, before the HonorableEdward J. Lumbard, United States Circuit Judge, sitting by designation, on December 8, 9 and 13, 1976, and at the conclusion of the evidence the Court having reserved decision, and the Court thereafter on February 24, 1977, having handed down its opinion, conctituting its findings of fact and conclusions of law, and the Court having found in favor of the defendants, it is,

ORDERED, ADJUDGED and DECREED: That defendants SEATRAIN, LINES, INC., and STRICK CORPORATION have judgment against plaintiff FRUEHAUF CORPORATION dismissing the complaint.

Dated: New York, N.Y.
February 28, 1977

Raymond F. Burghardt
Clerk

3/25/77 - Bill of Costs as taxed in the sum of $358.56, as against plaintiff, and in favor of both defendants, and added to the judgment.

Raymond F. Burghardt
CLERK

NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

FRUEHAUF CORPORATION,

Plaintiff,

-against-

SEATRAIN LINES, INC., and
STRICK CORPORATION,

Defendants.

----------X

Civil Action File
No. 73 Civ. 120
(J.E.L. - C.J.)

NOTICE OF APPEAL

S I R S :

PLEASE TAKE NOTICE that Fruehauf Corporation, plaintiff herein, hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment entered in this action on February 28, 1977 in favor of the defendants Seatrain Lines, Inc., and Strick Corporation against plaintiff Fruehauf Corporation dismissing the complaint, and the said plaintiff hereby appeals from each and every part of said Judgment.

Dated: New York, N.Y.
March 23, 1977

Yours, etc.,

CONBOY, HEWITT, O'BRIEN & BOARDMAN

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service of two copies of

the within Appendix is

hereby admitted this 2d day

of May, 1977

Simpson Thacher & Bartlett

Attorney for